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A Digest of Cases

RELATING TO THE

CONSTRUCTION OF BUILDINGS

THE LIABILITY AND RIGHTS OF ARCHITECTS, SURVEYORS AND BUILDERS IN RELATION THERETO,

WITH NOTES;

AND AN

APPENDIX OF FORMS

OF

PLEADINGS, BUILDING AGREEMENTS AND LEASES, AND CONDITIONS OF CONTRACTS.

BY

EDWARD STANLEY ROSCOE,

BARRISTER-AT-LAW,

Honorary Associate of the Royal Institute of British Architects.

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PREFATORY NOTE.

The following short Digest contains all the cases which have as yet been decided in regard to the erection of buildings. There are, of course, many decisions which affect building contracts, and the duties and rights of architects, which are not strictly what may be called building cases, although the legal principles contained in them are applicable to this subject. But in nearly all the decisions, which follow, some matter connected with building was directly involved. Any one, therefore, who is professionally interested in this subject, whether as lawyer, architect, or builder, will be able, within a small space, to find any point arising directly out of building operations, which has hitherto been decided after an argument in Court. And it is hoped that the notes which accompany the cases will help to make the legal points clear to business men who are not lawyers, and also to form the decisions into a slightly connected exposition of this branch of the law.

It should be observed, that decisions arising out of the Metropolitan Building Acts and local statutes have not been inserted in this book; to have done so would have caused me to touch on ground already well occupied by previous works.

In the Appendix will be found some precedents of pleadings on the points which most commonly are the subject of litigation when disputes unfortunately occur in relation to the construction of buildings. The Forms of Agreements and Leases which follow are of proved worth, for they are taken from Davidson's "Precedents in Conveyancing,"—the mere name of which is a sufficient recommendation to lawyers,—with the kindly granted permission of the author, and of Messrs. Maxwell & Sons, the publishers, to whom my thanks are therefore due. The first form of conditions of contract is that of the National Association of Master Builders of Great Britain. It shows, also, the form issued by the London Builders' Society, which is nearly identical. The second form of conditions is one drawn up by Mr. G. F. Trollope, Honorary President of the Central Association of Master Builders of London, and is the result of his own wide experience, and of the opinions of other skilled persons. From these two sets of conditions it should be possible to obtain provisions applicable to all ordinary building contracts.

E. S. Roscoe.

4, Harcourt Buildings, Temple.
October, 1879.

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The Digest is republished, with additions, from the "Builder."

A Digest

OF

BUILDING CASES.

APPROVAL.—See Landowner.

ARCHITECT.

Authority of Architect.

THE architect is the agent of the employer generally for all purposes connected with the structure of which he has prepared plans, and the erection of which he is to superintend. *Kimberley* v. *Dick*, L. R., 13 Eq. 1; 41 L. J., Ch. 38 (1871).

This case was decided upon the general evidence of what passed between the architect and the employer, and it seems to show that, as a rule, the architect is the agent of the latter for all purposes relating to the building in question. In *Scrivener* v. *Pask*, 18 C. B., N. S. 785, and

L. R., 1 C. P. 715, the question was partially raised as to whether the architect was the house-owner's agent to take out the quantities, but the decision of the Court did not touch this point. When an architect is employed merely to prepare plans he can scarcely be considered as an agent at all, for he supplies a certain thing for a certain sum; but since, as in general, architects have more to do than merely supply plans, they become agents for the building-owner, and fall within the class known as general agents,—that is, agents who have authority to act in a certain character, as distinguished from special agents who have a special authority to do a particular act. An agent of the former class can bind his principal by all acts within the scope of his employment as against third parties, although the employer may have privately limited his authority; but parties dealing with an agent of the latter class must make themselves acquainted with the limits of his authority. Therefore, since architects, generally speaking, must be considered as general agents, the question which must often arise in practice is whether certain acts fall within the scope of their employment. Thus, has an architect, who is engaged to prepare plans and to superintend the erection of a building, authority to order a quantity surveyor to prepare bills of quantities, and to bind his employer to remunerate the surveyor? This, apart from any specially expressed or implied agreement between an architect and his employer, is a point which cannot at present be decisively answered in the absence of any authoritative decision on the point, see *post*, p. 45. It will be obvious that other questions of a similar kind easily arise in practice which must be decided by the light of the principle briefly mentioned in this note.

It may also be well to point out that "the same rules of law and equity apply alike to private individuals, public

companies, and government bodies in regard to the authority of their agents." *Thom* v. *Commissioners of Public Works*, 32 Beavan, 490 (1863).

When there is a clause in an agreement between a contractor and an employer that in case the employer or his surveyor (or architect) shall at any time during the progress of works order any extra work to be done, this means not that the surveyor (or architect) has authority to alter the general plan of the works, or any part of such plan, in a radical manner, but only to deal with alterations in matters of detail. *Rex* v. *Peto*, 1 Young & Jervis, 37 (1826).

This case was decided chiefly upon the construction of the instrument before the Court, but it shows that, as a general rule, unless the contract makes it clearly apparent that the architect can order radical alterations he will only be held to have power to deal with details: the question of the authority of the architect to order alterations was raised in *Cooper* v. *Langdon*, 9 M. & W. 60, where no authority was shown on the pleadings to the architect from his employer to order alterations from the plans. But this point was so subsidiary to questions relating to an arbitration that this case has little authority as a precedent.

If an architect falsely represents to another person that he has the authority of his employer

to do some act, and that other person, acting on the faith of this representation, is thereby injured, he is entitled to recover from the architect damages in respect of the actual loss sustained by him in consequence of his having acted on the representation. *Randell* v. *Trimen*, 18 C. B., 786 (1856).

The principle of *Randell* v. *Trimen* was confirmed by *Collen* v. *Wright*, 7 E. & B. 301; 8 E. & B. 647 (1857). The principle is applicable when the architect not having, in fact, authority to make the contract as agent, yet does so under the *bonâ fide* belief that such authority is vested in him. In *Randell* v. *Trimen* an architect ordered stones for a church, representing that he had authority from his principal so to do.

Duties of Architect.

Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud on such principal cognisable by a Court of Equity, and entitles the first-named principal to obtain full redress for such fraud, or to have the contract rescinded, and to refuse to proceed with it in any shape. *Panama and South Pacific Telegraph Company* v. *The India-*

rubber Telegraph Works Company, L. R., 10 Ch. 515; 45 L. J., Ch. D. 121 (1875).

The last part of this proposition as to the revision of the contract was laid down *ipsissimis verbis* by James, L. J., but was not wholly consented to by Mellish, L. J. But this case enunciates an important principle to be observed in the dealings of architects and others, and in the course of the judgment of the Court below the cases connected with this subject in which architects have been concerned were dealt with. Examples and further extensions of the proposition will be found in the cases which immediately follow.

Where an architect agrees with an employer that the work in respect of which he is employed shall not exceed a fixed sum, such agreement is not binding on a builder unless it is brought to his knowledge. *Kimberley* v. *Dick*, L. R., 13 Eq. 1; 41 L. J., Ch. 38 (1871).

Where an architect is by the contract between the employer and builder to determine the amount due to the builder, and such architect has given to the employer an assurance that the cost of the work shall not exceed a

certain sum, the architect does not, in the eye of the law, possess the unbiassed mind which will enable his decision to be just and conclusive, and the builder may bring a claim for a sum over and above that allowed by the architect. *Kemp* v. *Rose*, 1 Giffard, 258 (1858); 27 L. J., Ch. 264. On appeal, 3 De G. & J. 354; 28 L. J., Ch. 230. Confirmed in 1871 by *Kimberley* v. *Dick*, L. R., 13 Eq. 1; 41 L. J., Ch. 38.

Contingent Engagement of Architect.

When an architect agrees to do certain work (laying out land for building purposes, and making surveys thereof), and to make no charge for such work, and it is further agreed that in certain events (if the land is disposed of for building purposes) he shall be appointed architect, or if his services are dispensed with, that he shall receive remuneration for the work primarily done, he is not, though he has done the primary work, entitled to make any charge unless the event agreed upon actually

happens. *Moffat* v. *Laurie*, 24 L. J., C. P. 56 (1855).

It will be observed in this case that the land was not let for building purposes; hence there were no services of the architect to be dispensed with, the event after which the services could become possible never having taken place. It is an important case also, as showing how careful professional persons should be in doing work the payment for which is made contingent on the happening of certain events, which, though they will very probably occur, are not certain to happen.

Death of Architect.

The death of an architect or engineer in the course of his work dissolves his contract with his employer. If he has undertaken to do the work for a certain sum, and he dies before completing it, his representatives can receive nothing; but if the payment for the work is divisible, then so much as has accrued due at the time of death is recoverable. *Stubbs* v. *Holyhead Railway Company*, L. R., 2 Ex. 311; 36 L. J., Ex. 166 (1867).

As an example of the last part of the above proposition payment at the rate say of 50*l.* per month may be mentioned.

ALLOWANCE FOR OLD MATERIALS.—
See Materials.

AWARD.

Where by an agreement between the builder and an employer the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, this is not a submission to arbitration, nor is the determination an award, so as to fall within sect. 17 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 17); *Wadsworth* v. *Smith*, L. R., 6 Q. B. 332; 40 L. J., Q. B. 118 (1871).

But where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, this may in effect be a submission to arbitration. Thus an architect's certificate falls within the principle of the above case, unless, even though in the form of a certificate, it is a decision upon a disputed point.

BANKRUPTCY.

When there is a clause in a contract that if the contractors become bankrupt the architect may appoint other persons to complete the work, and shall have power to seize and retain all materials, implements and plant, this gives the employer a right, in case of the bankruptcy of the contractor, to retain possession of the materials, &c., as against the trustee in bankruptcy of the debtor. *In re Waugh, Ex parte Dickin*, L. R., 4 Ch. D. 524; 46 L. J., Bank. 6 (1876).

This case touched the construction of section 94 of the Bankruptcy Act, 1869, but it is noticeable in connection with the preceding cases. This decision should also be compared with that of *In re Winter, Ex parte Bolland*, 47 L. J., Bank. 52 (1878): here the plant, &c., was to be "deemed the property of the commissioners for the time being," and it was held that this only gave the employers (the commissioners) a right of user, and, therefore, that the plant necessarily passed to the contractor's trustee, and see *post*, p. 39.

BUILDER.

Procedure in Case of Inefficient Work by Builder.

When work has been inefficiently done, or not executed according to the forms of the contract, the person for whom the work is done may either deduct the amount from the contract price and set up this defence if an action is brought for the whole sum, or he may pay the whole amount and subsequently bring a cross action for non-performance of the contract. *Davis* v. *Hedges*, L. R., 6 Q. B. 687; 40 L. J., Q. B. 276 (1871).

Thus if it is clear, for example, that, in the erection of a house, the work has not been properly done, when the time for payment has arrived the house-owner may set off a proper diminution of the price against a builder's claim. On the other hand, if he has paid the builder, and subsequently finds some defect in the works, the fact of such previous payment does not prevent his claiming damages in respect of the defective work.

It is not uninteresting in this place to compare the law of France in regard to the liabilities of builders and architects with that of England. The two important sections of the Code Civil are as follows :—

"Si l'édifice, construit à prix fixe, périt en tout ou en

partie par la vice de la construction, même par la vice du sol, les architectes et entrepreneurs en sont responsables pendant dix ans."—Code Civil, livre iii., title viii., s. 1792.

"If an edifice, constructed at a given price, perish wholly or partially through the faultiness of its construction, even by the badness of its foundation, the architects and contractors are responsible for it for ten years."

"Lorsqu'un architecte ou un entrepreneur s'est chargé de la construction à forfait d'un bâtiment, d'après un plan arrêté et convenu avec le propriétaire du sol, il ne peut demander aucune augmentation de prix, ni sous le prétexte de l'augmentation de la main-d'œuvre ou des materiaux, ni sous celui de changemens ou d'augmentations faits sur ce plan, si ces changemens ou augmentations n'ont pas été autorisés par écrit et le prix convenu avec le propriétaire."—S. 1793.

"Where an architect or contractor is charged with the construction of a building by contract according to a plan agreed upon and arranged with the owner of the soil, he can demand no increase of price, neither under pretext of the increase of the workmanship or the materials, nor under that of alterations in, or augmentations to, such plan, if these have not been authorized by writing, and the price agreed upon with the proprietor."

Payment of Builder.

When a builder contracts to erect a structure which, when completed, proves to have been so badly executed as to be practically of no use to the employer, the builder is not entitled to any

remuneration for his services. *Farnsworth* v. *Garrard*, 1 Camp. 38 (1807).

This was a decision of Lord Ellenborough at nisi prius. It is placed, however, in this collection as the principle had, according to Lord Ellenborough, formed the subject of discussion among the judges, so that it is entitled to more attention than ordinary dicta at jury trials.

When there is an agreement by a builder to erect a house, this is a contract which, as a general rule, the courts of equity will not enforce by a decree of specific performance. *Brace* v. *Wehnert*, 25 Beav. 348 (1858).

See observations of Mellish, L. J., in *Wilkinson* v. *Clements*, L. R., 8 Ch. 96. The general doctrine of equity in connection with this point is set out in Watson's Compendium of Equity, vol. i. p. 93:—"Equity will not in general enforce an agreement to build or repair a house (*Paxton* v. *Newton*, 2 Sm. & G. 437; *Brace* v. *Wehnert* (*supra*); *Norris* v. *Jackson*, 1 J. & H. 319; comp. *Mosely* v. *Virgin*, 3 Ves. 184; *Cubitt* v. *Smith*, 10 Jur., N. S. 1123). But if a contract has been in part performed by one party the Court will enforce performance in specie, though of an agreement to build by the other party (*Price* v. *Corporation of Penzance*, 4 Ha. 506); and in a case where A. contracted for the erection of a house on his land, and died intestate, it was held that his heir had an equity to have the house built and paid for out of A.'s personal estate (*Holt* v. *Holt*, 2 Vern. 322; *Lechmere* v. *Carlisle*, 3 P. W. 222; *Cooper* v. *Jarman*, L. R., 3 Eq. 98); also where a contract to build

or repair, &c., forms part of some other contract, for instance, to grant a lease, of which the Court ordinarily grants specific performance, it will specifically execute the latter, and grant damages for the non-performance of the former (*Middleton* v. *Greenwood*, 2 D. J. & S. 142. See *Kay* v. *Johnson*, 2 H. & M. 118; *Mayor and Corporation of London* v. *Southgate*, 3 W. N. 297; and cf. *Lewers* v. *Earl of Shaftesbury*, L. R., 2 Eq. 270)."

Brace v. *Wehnert* is still the law so far as relates to the specific performance of an agreement to build, but owing to 21 & 22 Vict. c. 27, s. 2, and *Soames* v. *Edge*, John. 669, and *Mayor of London* v. *Southgate*, 38 L. J., Ch. 141 (1869), it must be considered less extensive in its effect. By these two latter cases it becomes clear that the Court will, if there is an agreement by a builder to erect a house, and by a landowner to grant a lease when the house is completed, give the landowner damages for the non-performance of so much of the agreement as relates to the building of the house, and then decree the specific performance of the remainder by compelling the builder to accept the lease. For some observations as to damages, see *Oldershaw* v. *Holt*, 12 Ad. & E. 560 (1840).

BUILDING FUND.

Liability of Trustees of.

An agreement between a builder and the trustees of a building fund may be so framed as to limit the liability of such trustees under

such agreement to the period during which they remain trustees. The agreement may also be framed so as to except such trustees from any personal liability, and to bind them only to the extent of the fund. *Williams* v. *Hathaway*, L. R., 6 Ch. D. 544 (1877).

Compare this case with *Furnivall* v. *Coombes*, 5 Man. & G. 736. These cases should warn builders to be careful how they enter into contract with persons, such as the holders of a fund for the erection of a church, who have only a certain sum at their disposal; and, on the other hand, serve equally as examples to such trustees to divest themselves of all personal liability, and to bind only the fund of which they are the holders.

BUILDING LEASE.

Where there is an agreement between a builder and the owner of land that the builder will erect houses on such land, and that the landlord will grant leases of separate portions of such land as soon as the houses have been erected thereon and certain other conditions performed, such agreement is a separable contract, and entitles the builder or the assignee of his interest to require leases to be granted

to him of such plots, even though he may not be able to perform the whole agreement. *Wilkinson* v. *Clements*, L. R., 8 Ch. 96; 42 L. J., Ch. 38 (1872).

The meaning of this important case may be made clearer by an example. Agreement between A., builder, and B., landlord, that A. will build houses on estate C., divided into plots, D., E. and F., that A. shall be entitled to a lease of plot D. as soon as the houses are built thereon and finished ready for occupation. A. becomes bankrupt, having mortgaged his interest in plot D., on which the houses are finished, to G., and is unable to complete the contract, G. is entitled to have a lease of D. granted to him.

Agreement to let Land on Building Leases.

Where a landowner engages to let land to a builder on building leases, and to lend him a certain sum to assist him in the erection of a certain number of houses, to be repaid by a certain date, on the security of the houses to be erected, and the landowner, when some of the houses have been built and some of the money advanced, requests the builder not to continue his operations, and the builder desists, the landowner is entitled to recover back the amount so lent, though he has not advanced the whole

sum which he agreed to do. *James* v. *Cotton*, 7 Bingham, 266 (1831).

The Chancery Division of the High Court of Justice has power under 11 Geo. IV. & 1 Will. IV. c. 65 s. 17 (1830), to sanction a building lease of an infant's estate when he is seised in fee simple in reversion after a life estate by the curtesy vested in his father. *In re Letchford*, L. R., 2 Ch. D. 719; 45 L. J., Ch. D. 530 (1876).

This case shows that the statute in question is to be construed liberally. Cf. *In re Evans*, 2 My. & K. 318; *Ex parte Legh*, 15 Sim. 445; *In re Clark*, L. R., 1 Ch. App. 292. The section in question, so far as relates to building leases, is as follows:—"Where any person, being an infant under the age of twenty-one years, is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or under-lease should be made of such estates for a term of years for encouraging the erection of buildings . . . . it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such person respectively, or any part thereof, according to his or her interest therein respectively, and to the nature

of the tenure of such estates respectively for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct; but in no case shall any fine or premium be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease; and the leases and covenants and provisions therein shall be settled and approved of by a master of the said Court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterpart shall be deposited for safe custody in the master's office until such infant shall attain twenty-one, but with liberty to proper parties to have the use thereof if required in the meantime for the purpose of enforcing any of the covenants therein contained; provided that no lease shall be made of the capital mansion house and the park and grounds respectively held therewith, for any period exceeding the minority of any such infant."

Building leases under the Settled Estates Act, 19 & 20 Vict. c. 20 (1856) will be granted for a term as long as 600 years. *In re Cross's Charity*, 27 Beav. 592 (1859).

Cf. *Carr's Settled Estates*, 9 W. R. 776, where the term was 999 years. 19 & 20 Vict. c. 20, s. 2, runs: "It shall be lawful for the Court of Chancery in England, and for the Court of Chancery in Ireland so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, to authorize leases of any

settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:

"First, every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding . . . for a building lease, ninety-nine years; or where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant building leases for longer terms, then for such term as the Court shall direct.

"Secondly, the best rent which can be reasonably obtained is to be reserved.

"Fourthly: No such lease shall authorize the felling of any trees, except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations or other works authorized by the lease."

By sect. 12, when the land is sold for building purposes, the consideration may wholly or partially take the form of rent. There are various other clauses touching mere strictly legal points.

CERTIFICATES.

When it is stipulated in a contract between a builder and an employer that payment shall be made after the architect has certified that the works are properly completed, it is a con-

dition precedent to the establishment of a claim by the builder against the employer that such certificate has been given by the architect. *Morgan* v. *Birnie*, 9 Bingham, 672 (1833).

Confirmed in 1850 by *Milner* v. *Field*, 3 Exch. 829; 20 L. J., Ex. 68, in which it is stated that even if the certificate is withheld by fraud, the builder cannot recover against the house-owner if he pleads the fact that a certificate has not been given, but that the builder has his remedy by an action for damages; but this is not in accordance with *Batterbury* v. *Vyse*, 2 H. & C. 42; 32 L. J., Ex. 177.

Dallman v. *King*, 5 Scott, 382 (1837), is an example of an agreement in regard to which approval of the work was held not to be a condition precedent.

The architect may certify by word of mouth, unless the contract between the builder and employer expressly stipulates that the certificate shall be in writing. *Roberts* v. *Watkins*, 14 C. B., N. S. 592; 32 L. J., C. P. 291 (1863).

A certificate that the work has been done in a satisfactory manner means a document or expression which states this fact, directly or indirectly; and a letter from the architect,

merely enclosing a builder's account checked by him, is not a certificate. *Morgan* v. *Birnie*, 9 Bing. 672 (1833).

An architect's certificate is valid without reference being made in it to the amount that may be due to the builder [unless there be any special provision in the contract that the amount due shall be stated in the certificate]. *Pashby* v. *The Mayor and Corporation of Birmingham*, 3 C. B. 2 (1856).

When it is stipulated in the contract between the employer and contractor that a written order must be given for extra work, and no such written order is given; yet, if the architect at the end of the engagement makes a certificate allowing such extra work, it is conclusive and final, unless his conduct has been fraudulent. *Goodyear* v. *Mayor of Weymouth*, 35 L. J., C. P. 12 (1865).

Cf. *Connor* v. *Belfast Water Commissioners*, 5 Ir. Rep., C. L. 55, in which it was held in an action for the price of certain extra works, that the engineers having given a certificate for the extra works, the defendants were precluded from setting up as defences to the action that the

extra works had not been ordered in writing, and that no accounts had been sent in for them as required by the deed. See also *Harvey* v. *Lawrence*, 15 L. T., N. S. 571 (1867).

Certificates given during the progress of the work in order that interim payments by way of advances may be made to the contractor by the employer are not final, but are merely statements of the weight, &c., and contract price of materials on the ground; and the payments made under these certificates are altogether provisional, and subject to readjustment at the end of the contract. *Tharsis Sulphur Co.* v. *McElroy*, 3 App. Cas. 1040 (1878).

This and the preceding case when read together seem to contain in a short form the effect of certificates in regard to written orders for extra work. Compare also *Lamprell* v. *The Billericay Union*, 18 L. J., Ex. 283 (1849); and see *post*, p. 33.

When a builder brings an action against the employer for sums due in respect of work done, and the architect has certified for a sum less than that which is claimed, the employer must plead the fact of such certificate having been given in an action at law, and not move for an injunction in the Chancery Division of

the High Court of Justice to restrain the continuation of the action. *De Worms* v. *Mellier*, L. R., 16 Eq. 554 (1873).

When an architect fraudulently, and in collusion with the employer, withholds a certificate that the builder has executed his work in a satisfactory manner, such builder, if the architect has made the contract with him as agent for the employer, can sue the architect for damages. *Ludbrooke* v. *Barrett*, 46 L. J., C. P. D. 798 (1877); 36 L. T., N. S. 616.

The principle of this judgment would seem to be applicable to a case where the house-owner, and not the architect, had made the contract with the builder if fraud could be proved against the architect. See next case.

The builder may under similar circumstances sue the architect, even if the contract were entered into with the employer and not with the architect. Per Coleridge, C. J., *Stevenson* v. *Watson*, L. R., 4 C. P. D. 148; 48 L. J., C. P. D. 318.

The builder may bring an action against the employer for the sums due to him for work

done, though the architect has not given a certificate, if such certificate has been withheld by the fraud of the architect, in consequence of collusion with the employer and by his procurement. *Batterbury* v. *Vyse*, 2 Hurl. & C. 42 (1863); 32 L. J., Ex. 177.

Cf. *Scott* v. *The Corporation of Liverpool*, 1 Giff. 216, where, since no collusion or corruption was proved, the suit by the contractor against the corporation was dismissed; and *Bliss* v. *Smith*, 34 Beav. 408. The principal decision is further confirmed by a dictum of Erle, C. J., in *Goodyear* v. *The Mayor, Aldermen and Burgesses of Weymouth*, 35 L. J., C. P. 12. And see also *Sharpe* v. *San Paulo Railway Company*, L. R., 8 Ch. App. 597 (1873).

When the conduct of the architect has not been discreet, impartial, and fair, in giving certificates, so that the builder is a loser thereby, the latter may bring an action against the employer for his charges. *Pawley* v. *Turnbull*, 3 Giff. 70 (1861).

The following was the form of the decree in this case:—"It appearing from the evidence that the defendant Hay (the architect) acted improperly and unfairly in the exercise of the powers conferred upon him by the contract in the pleadings mentioned, declare that the plaintiff is entitled to recover from the defendant Turnbull (the employer)

the full amount of 2,590*l.*, the contract price, and the sum of 190*l.* for extra work."

It will be observed that in this case certificates had been given, but that they were not fairly made; in the previous case of *Batterbury* v. *Vyse*, *ante*, p. 23, the certificates had been withheld altogether.

It is scarcely necessary to observe that if similar conduct in the architect had been proved which was injurious to the house-owner, and the architect had given certificates which showed more money due to or work done by the builder than was in fact the case, the house-owner, on the principle underlying these decisions, would be able to bring an action against the architect for any losses sustained thereby. It is also to be noticed that the case of *Pawley* v. *Turnbull*, *supra*, is not very easily reconciled with that of *Clark* v. *Watson*, 18 C. B., N. S. 278; 34 L. J., C. P. 148 (1865), which was an action by a contractor against his employer for the amount of his charges, and it was averred that the work had been properly done, but that the surveyor "had wrongfully and improperly neglected and refused" to certify. The Court held the allegations were not sufficient to entitle the plaintiff to succeed. It would appear, however, that the Court did not consider the word "wrongfully" equivalent to "fraudulently." But in *Pawley* v. *Turnbull* there was nothing actually fraudulent, that is, deceitful, but merely the grossest unfairness towards the builder of an open character, a plain violation of duty; considering, however, that the rules of equity are now to prevail in all the courts, the doctrine of *Pawley* v. *Turnbull*, which was decided by the Court of Chancery, would seem to be the governing principle rather than the narrower rules of the common law.

When an architect carelessly and negligently performs the work required to give a certificate, so that the builder does not receive all that is properly due to him, he cannot bring an action against the architect if no fraud is alleged. *Stevenson* v. *Watson*, L. R., 4 C. P. D. 148; 48 L. J., C. P. D. 318.

This is not a satisfactory case, for the Court decided it with the understanding that in any event there would be an appeal against their decision. Ultimately, circumstances unconnected with the actual point under dispute prevented the matter from reaching the Court of Appeal.

It was decided in an Irish case that—"No action at law for not certifying lies at the suit of a contractor against an architect or engineer employed by the general principal, and such architect or engineer has not been a party to the contract between the principal and the contractor." *Murphy* v. *Bower*, 2 Ir. Rep., C. L. 507 (1866). The declaration averred that the defendant had "wrongfully, improperly and without just cause," refused to certify, and it was held on demurrer that no cause of action was shown; and it was said by the Court that if collusion had taken place between the person who should have certified and his principal, an action should have been brought against both. The case seems chiefly to turn on a question of pleading.

COMPLETION OF WORKS.

When it is agreed between a builder and his employer that the work shall be completed by a specified date, and that if it is not so completed a sum shall be paid by the builder to the employer in respect of every day which elapses after the specified time, until completion, and the employer orders extra work to be done, so that the specified time is exceeded; such order for extras does not put an end to the stipulation, but only entitles the builder to have an allowance made in respect of the days necessarily occupied in the execution of the additional work. *Legge* v. *Harlock*, 12 Q. B. 1015 (1848).

Compare this case with that of *Jones* v. *St. John's College, Oxford, post*, p. 27.

When a builder contracts to complete a certain work by a specified time, and also alterations and additions subject to the original conditions, and that the periods for completing the alterations and extras shall not exceed the period first named, he is bound to complete the work by the time specified; and, even if this is an impossibility, he is liable for the penalties

agreed on or other damages in consequence of such non-completion by the date fixed on. *Jones* v. *St. John's College, Oxford*, L. R., 6 Q. B. 115; 40 L. J., Q. B. 80 (1870).

This case exemplifies the way in which builders sometimes for the purpose of business enter into stipulations which may turn out wholly one-sided; and it further shows that when this happens the law will not help them, because, to quote from Mr. Justice Hannen's judgment, "if a man does in direct terms enter into a contract to perform an impossibility subject to a penalty, he will not be excused because it is an impossibility."

Where there is an agreement by a contractor to complete work by a specified date, and subsequently another agreement to do extra work within a reasonable time, and such extra work is so mixed up with the original work that the latter can only be completed at the same time as the former, this waives the original condition and prevents the employer from suing for any penalties consequent on the non-completion of the work by the time originally fixed. *Thornhill* v. *Neats*, 8 C. B., N. S. 831 (1860).

If this and the two preceding cases be taken together, they seem to show clearly enough what the law is.

When work under a building (or other) contract has been substantially completed (that is, if some small portions of the work are unfinished), the builder is entitled to receive payment. *Lucas* v. *Godwin*, 3 Bing. N. C. 732 (1837).

This principle may be qualified by the fact that there is a term in the contract which forms a condition precedent to payment, such as the giving of a certificate by an architect, which has not been complied with. See *Munro* v. *Butt*, 8 E. & B. 739.

Prevention of Completion.

When a builder undertakes to complete a work in a given time, and such completion within such given time is prevented by some act of the employer, the builder is not liable for any damage in consequence of such non-completion. *Holme* v. *Guppy*, 3 M. & W. 387 (1838).

A builder or contractor may bring an action against his employer for preventing the completion of the work, and thereby causing him damage, and it is no defence to such an action

to say that the non-exercise of due diligence on the part of the contractor "was not, in the opinion and according to the determination of the architect, caused or occasioned by the acts of the employer or his architect." *Roberts* v. *Bury Improvement Commissioners*, L. R., 5 C. P. 310; 39 L. J., C. P. 129 (1870).

The meaning of this decision may be made clearer by the following statement. By the terms of the contract the architect may, for various reasons specified in the contract, give further time, or the employer may put an end to the contract, if, according to the opinion of the architect, the contractor does not exercise due diligence, and make due progress. The employer does put an end to the contract, and the contractor brings an action for being prevented from completing the contract. To this the employer pleads that in the opinion of the architect the contractor did not make proper progress. To this the contractor replies that the alleged fact of his not making proper progress was caused by the default of the employer and his architect in supplying plans and drawings and in setting out land, &c.; to which again the employer rejoins that, according to the opinion of the architect, there was no default on his part. To say this is beyond the scope of the architect's authority, and is a question to be tried as a matter of fact. His authority extends, subject to the provisions in the contract, to giving an opinion that the contractor is not proceeding with due diligence, but, as in law a man cannot take advantage of any non-fulfilment of a condition the perform-

ance of which has been hindered by himself, it is perfectly allowable for the contractor to rely upon the fact, subject to proof, that the non-fulfilment had been caused by the act of the employer or his servant. And compare dicta of Lord Campbell in *Munro* v. *Butt*, 8 E. & B. 739.

When a person contracts to do an entire work for a specific sum, he can recover nothing until the work is completed, or unless it can be shown that it was the fault of the employer that the work was incomplete, or unless there is something to justify the conclusion that the parties have entered into a fresh contract. *Appleby* v. *Myers*, L. R., 2 C. P. 651; 36 L. J., C. P. 331 (1867).

Failure to Complete.

If a builder, being unable to complete his contract, enters into an agreement to give up the contract and to receive a sum down, and to be paid for so much of the work as is done according to the valuation of a third party, and such agreement is acted upon, he cannot subse-

quently have this agreement set aside. *Ormes* v. *Beadel*, 30 L. J., Ch. 1 (1861).

CORPORATION.

When an architect or contractor enters into a contract with a corporation, such contract will not be binding on the corporation, unless it be under seal. *Hunt* v. *The Wimbledon Local Board*, L. R., 4 C. P. D. App. 48; 48 L. J., C. P. D. App. 207 (1878).

This case more immediately turned on section 85 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and section 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 54); but it is also the latest authority for the above general proposition. It is noticeable, particularly as showing the necessity for architects to stand on strict legal principles in dealings with public bodies such as local boards. Because it is further stated by the Court of Appeal that in their opinion, even if the architect's plans are used by a corporation, which acts not for its own benefit, but as trustees for a certain portion of the public, such a corporation would not be liable, on the ground that it had benefited by the work, as would be the case generally speaking if similar

facts existed in a contract between an architect and a private individual.

DEATH.—See Architect, Landowner.

DRAWINGS.

When an architect agrees to prepare probationary drawings for approval, and all the working drawings and specifications, he is not entitled to payment unless his drawings are approved. *Moffat* v. *Dickson*, 13 C. B. 543; 22 L. J., C. P. 268 (1853).

EMPLOYER.—See Landowner.

EXTRAS.

When it is stipulated in a contract that additions made "by an order in writing" shall be paid for, extras done without such order, even

though at the request of the employer, cannot be claimed for by the contractor or builder. *Russell* v. *Da Bandeira*, 13 C. B., N. S. 149; 32 L. J., C. P. 68 (1862).

This is the leading case upon this point of an order in writing for extras. But see *Goodyear* v. *Mayor of Weymouth*, 35 L. J., C. P. 12 (1865); *ante*, p. 20, which shows that if the architect has certified that a certain sum is due in respect of extras, though no order in writing as required by the contract has been given, the certificate does away with the want of a written order.

When alterations in, additions to, or deductions from work originally engaged to be done under a contract are not to be executed without a written order from the employer's architect or engineer, and they are in fact executed without such order, certificates under which advances are made by the employer to the contractor from time to time will not do away with the necessity for written orders, without which the contractor cannot make a valid claim for extra work. *Tharsis Sulphur and Copper Company* v. *M'Elroy and Sons*, 3 App. Cas. 1040 (1878).

This case really confirms a still older decision, viz., *Lamprell* v. *The Billericay Union*, 18 L. J., Ex. 283 (1849), and the effect of it is as above stated. These certificates, given

during the progress of the work, are, according to Lord Cairns's judgment, as has been already pointed out, simply statements of a matter of fact, namely, what is the weight and what is the contract price of the materials actually delivered from time to time upon the ground, and the payments made under those certificates are altogether provisional and subject to adjustment or readjustment at the end of the contract. They are, in fact, only notices that there is sufficient security for any interim payments by way of advances which may be made by the employer to the contractor. This case, therefore, does not seem to be irreconcileable with *Goodyear* v. *The Mayor of Weymouth*, 35 L. J., C. P. 12, in which the certificate was a *final* declaration by the architect that a certain sum was due to the contractor, although no written orders for extras had been given to him.

When alterations and additions must be authorized by the architect in writing, sketches of extra work, prepared by the architect, and furnished by him to the builder, are not sufficient authority. *Myers* v. *Sarl*, 30 L. J., Q. B. 9 (1860).

When there is a contract to build and complete a house, according to a specification, and certain details necessary for the proper completion of such house are omitted from the specification, the contractor is not entitled to charge

for such details as extras, though they are not mentioned *verbatim* in the terms of the contract. *Williams* v. *Fitzmaurice*, 3 H. & N. 844 (1858).

In this case, under the head "Carpenter and Joiner," there was specified the scantling of the joists for the floors, the rafters, and ridge and wall pieces; but no mention was made of the flooring, and it was decided that this could not be charged for as an extra. The specification, coupled with the memorandum of agreement, made it clear that it was unreasonable to hold that the contractor could have supposed that the flooring was intended to be an extra.

In a claim for extra work, it is necessary to prove by the original contract what is included within such contract, and if this document is inadmissible in evidence for the want of the proper stamp, it cannot be looked at, though not actually required to prove the extras themselves. *Buxton* v. *Cornish*, 12 M. & W. 426; 13 L. J., Ex. 91 (1844).

LANDOWNER.

Approval of Buildings by.

Where there exists a covenant or agreement by the purchaser of a piece of land that no building shall be erected thereon which has not been approved by the original owner of the land, or by his agent, and the builder erects a structure without such approval, he will be ordered to pay damages for so doing. *Kilbey* v. *Haviland*, 24 L. T., N. S. 353; 19 W. R. 698 (1871).

It is important to notice that in this case the owner of the land observed that a building was being erected without approval, soon after its commencement, and the builder was duly and properly warned in regard to it more than once. The Court was subsequently asked to grant an injunction ordering that the house (which had been completed) should be pulled down. But though the Court possessed the authority to do this, it would not exercise this power, but would only order the builder to pay damages. Therefore it is clear that the uniformity or general style of the whole range of building was marred, and consequently it is obvious that if a builder commences a structure without the plans for it having been approved, the Court should be asked for an injunction to restrain the continuance of the building operations at the earliest moment.

Death.

Where a building contract has been entered into between a builder and an employer, and the latter dies before the contract is fulfilled, the executor or administrator of the employer is bound to pay the sums due to the builder, and to allow the contract to be completed, and the executor or administrator of such deceased employer can bring an action against the builder if he does not fulfil his contract. *Wentworth* v. *Cock*, 10 Ad. & E. 42 (1839); *Cooper* v. *Jarman*, L. R., 3 Eq. 98 (1866).

LIABILITY FOR EXECUTION OF WORKS.

A house-owner who orders work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is responsible for such consequences, even if he has entrusted the work to a contractor

or other independent person, and even if he has adverted to the necessary precautionary measures in engaging such contractor. *Bower* v. *Peate*, L. R., 1 Q. B. D. 321; 45 L. J., Q. B. D. 446 (1876).

This case enunciates an important principle in regard to building operations. Thus, if, as in *Bower* v. *Peate*, the adjoining house ought to have been underpinned, and from an omission to do so by the contractor, it was injured, the house-owner who employed the contractor is liable in damages. But if a contractor is entrusted with work from which no injurious consequences can arise, if executed with due care, then the contractor alone is liable. For example, if a workman of a builder engaged in erecting a house were to knock a ladder over on to a passer-by, the contractor, and not the householder, would be liable for damages to the injured person. The above case seems also to show that a house-owner should obtain from a contractor an indemnity against any damage caused by work done in the execution of the contract.

LEASE.—See Building Lease.

MATERIALS, PLANT, &c. PROPERTY IN, ALLOWANCE FOR.

When there is a clause in an agreement between a builder and the employer that all materials brought upon the premises shall be considered as attached to and belonging to the premises, and that no part thereof shall be removed without the consent of the employer, this gives the latter an equitable interest in the materials. *Brown* v. *Bateman*, L. R., 2 C. P. 272; 36 L. J., C. P. 134 (1867).

Thus an execution creditor of the builder would have no right to take possession of materials upon the land of the builder's employer. It is difficult, however, to reconcile this decision with that in *Beeston* v. *Mariott*, 3 Giff. 436 (1864), in which the contract stated that as and when any material should be brought upon the site of the works thereupon it should become the absolute property of the employer, and be, and be considered as in their possession, and that the contractor should have no property therein except the right of using the material for work upon which he was engaged. It was further stipulated that the employer should, on the completion of the contract, give back the unused material and plant to the contractor; and further, that if the work should be taken out of the hands of the contractor, and placed with others who should employ and use the material and plant in question, then that compensation in respect of such material should be given to the old contractor. The Vice-Chancellor considered that

the materials could not be taken in execution by a creditor of the employer. The importance of both cases makes the apparent difference noteworthy.

When old materials are to be allowed for by a contractor, he must, if such allowance is included in his estimate, communicate the fact of his having so included it to the employer or his architect when he makes such estimate. For if disputes arise in regard to the contract, the evidence of the contractor that he has made such allowance is inadmissible. *Harvey* v. *Lawrence*, 15 L. T., N. S. 571 (1867).

PENALTIES.

When, in an agreement between a builder and an employer, there is a clause that in certain events (*e.g.* the non-completion of the work by a specified date) the former shall forfeit and pay a certain sum or sums to the latter, such sum or sums are in this nature not penalties, but liquidated damages. *Fletcher* v. *Dyke*, 2 Term

Rep. 32 (1787); *Bonsall* v. *Byrne*, 1 Ir. Rep., C. L. 537 (1867).

Liquidated, that is, ascertained damages as distinguished from penalties, which latter are not necessarily the exact sums due in respect of breaches of an agreement.

When it is stipulated in an agreement between a builder and an employer that in certain events penalties shall be due from the builder, to be deducted from the contract price, and a sum in respect of such penalties does become due from the builder, the employer may pay the builder the full amount of the contract price, and set off the sum due in respect of the penalties as payment against any claim for extras. *Duckworth* v. *Alison*, 1 M. & W. 412 (1836).

When it is provided in a contract that if the works shall not proceed as rapidly and satisfactorily as the employer requires, he shall have power to enter upon and take possession of the works, such a proviso gives an absolute and unqualified power to the employer so to do, according to his own discretion, if he acts in a

bonâ fide manner. *Stadhard* v. *Lee*, 3 Best & Smith, 364; 32 L. J., Q. B. 75 (1863).

This case seems to be somewhat qualified by the following decision, since in *Stadhard* v. *Lee* no actual date was fixed for the completion of the contract.

When there is a clause in a contract that if the contractor (or builder) fail to proceed with the execution of the works at the rate of progress required by the engineer (or architect), then that the contract shall be avoided and the materials and implements in the possession of the contractor shall be forfeited, &c., the employer can put such clause into force only before the precise date named for the completion of the contract. *Walker* v. *The London and North-Western Railway Co.*, L. R., 6 C. P. D. 518; 46 L. J., C. P. D. 798 (1876).

When there is a clause in a contract that if the engineer or architect does not consider that the works are being executed properly or with due expedition by the contractor, he shall give notice to the contractor to alter improper work, to supply sufficient labour, and to proceed

with due expedition, under pain of certain penalties; a *general* notice to the contractor to supply sufficient materials and labour, and to proceed with due expedition, is a valid notice. *Pauling* v. *Mayor and Aldermen of Dover*, 10 Ex. 753; 24 L. J., Ex. 128 (1855).

It further appears from this case that if the builder is required to do some particular thing a *special* notice to this effect is requisite, and that a mere general notice will not then suffice. But the decision of this second point was not necessary to the judgment in the above case, which was upon the sufficiency of the general notice when general dilatoriness in the work was the subject of complaint.

PLANT.—See Materials.

PLANS.—See Drawings; Warranty.

QUANTITIES.

When a surveyor prepares bills of quantities, and notice is given that the contractor who successfully tenders for the work will have to pay the surveyor a certain percentage for such bills of quantities, and the contractor who was eventually successful also agrees with the surveyor that his fees shall be paid out of the first instalment which he receives from the employer, there is an implied promise that the contractor, when his contract is accepted, will proceed with the work, and his obligation to pay the abovementioned percentage is established as soon as his tender is accepted. *McConnell* v. *Kilgallen*, 2 Irish C. L. R. 119 (1878).

The fact that the fees were to be paid out of the first instalment is not a further condition precedent to payment, in addition to the acceptance of the contractor's tender, but merely shows the manner in which the payment is to be made; so that as the payment could not be made in this form, owing to the contractor having abandoned the work, his liability became absolute and unconditional as if no such secondary stipulation existed.

Architects have by custom (which must be proved by proper evidence) an implied autho-

rity to employ surveyors to take out the quantities for buildings, the plans for the erection of which they have prepared. *Moon* v. *Guardians of Witney Union*, 3 Bing., N. C. 814 (1837); *Taylor* v. *Hall*, 4 Irish L. R., C. L. 467 (1869).

The above seems to be the result of these two cases; but it must always be remembered that such implied authority must be proved by the person who relies upon it, and that such proof may fail. Thus, in *Taylor* v. *Hall*, Morris, J., said:—"I am of opinion that there was no sufficient evidence of any such legal custom as that relied on by the plaintiff" (the surveyor); on the other hand, Monahan, C. J., considered that the architect has an implied authority to employ a surveyor. But it must also be remarked, in connection with *Moon* v. *Witney Union*, that the fact that quantities were to be taken out by a surveyor had been communicated to the solicitor of the union, and that when the architect sent in the bill of the surveyor with his own, the union did not at once repudiate their liability. Both these facts weighed much with the Court.

"REBUILDING" HOUSE.

A covenant or agreement "to rebuild" a house, or any other building, in a substantial and workmanlike manner, does not involve the obligation to erect the new house in the same

manner, and in the same style and shape, and with the same elevation, as the old building, though it must be placed on the same site. *Low* v. *Innes*, 4 De G., J. & S. 286 (1864).

SETTLED ESTATES.—See Building Lease.

STYLE.

The phrase employed in relation to the internal fittings of a house, "to be handsomely decorated according to the present style," is too vague and uncertain to enable a Court of Equity to enforce an agreement in which it occurs, so far as this phrase is concerned. *Taylor* v. *Portington*, 7 De G., M. & G. 328 (1855).

TENDERS.

A tender by a builder, and an acceptance of such tender by a house-owner, constitute a binding contract, and the parties will be bound by such agreement. An intimation in the acceptance of such tender that a contract will be prepared, merely means that a formal instrument shall be drawn up containing the terms of the previous agreement. *Lewis* v. *Brass*, L. R., 3 Q. B. D. 667 (1877). See also *The Guardians of Navan Union* v. *McLoughlin*, 4 Ir. Rep., C. L. 457 (1856).

This case shows that persons who make tenders should be careful to do so with their eyes open, otherwise they may find that they are bound fast by the contract into which they have entered. If, however, it can be gathered from the tender and acceptance that the agreement is made *subject* to the preparation and approval of a formal contract, then there is no agreement independent of that stipulation, and the formal contract is that which binds the parties. See *Winn* v. *Bull*, L. R., 7 Ch. D. 29 (1877); and *Commissioners of Kingston-upon-Hull* v. *Petch*, 10 Ex. 611; 24 L. J., Ex. 23.

A person who invites, by writing or word of mouth, tenders for work or for the purchase of anything does not by so doing impliedly pro-

mise to accept the lowest or the highest offer, or to accept any one of such tenders. The notice to persons willing to tender is a mere proclamation that he who issues the notice is willing to receive and to consider offers. *Spencer* v. *Harding*, L. R., 5 C. P. 561; 39 L. J., C. P. 332 (1870).

If anything, say in the notice for tenders for a building, could be construed as showing an undertaking to accept, say, the lowest offer, then there would be an exception to the above general rule.

If in a tender, or in the acceptance of a tender, there is a term that the materials to be supplied or the work to be done shall be at the order of the person who asks for tenders, then as soon as such order is given the tenderer is bound to supply the goods, or perform the work specified in the tender. *Great Northern Railway Company* v. *Witham*, L. R., 9 C. P. 16 (1873).

Thus, if in a tender for the supply of bricks the tenderer agrees to supply as many hundreds as the house-owner may order between certain dates, then, as soon as the order is given, the tenderer is bound to supply the bricks required. It is suggested in the judgment in this case that a tenderer before the order is given might, after notice

to the person to be supplied, back out of the agreement. But it seems doubtful if this suggestion, upon consideration, would be held sound.

A proposal to receive tenders for certain things to be sold (specifying no limitation or qualification) and an acceptance (also specifying no limitation or qualification) constitutes a contract to include the whole of such things. *Venn* v. *Commissioners of Public Works*, 32 Beavan, 490 (1863).

This case, which arose out of the sale of the stone contained in old Westminster Bridge, lays down as a principle an important rule in regard to the sale of old materials of a building, and has never since its decision been questioned.

WAIVER.

An employer, by taking possession of a building upon which work has been done, or which has been erected by a builder, does not, by so doing, waive the performance of any conditions precedent to payment to the builder,

nor does such act imply a waiver of a special contract and the substitution of a new and implied agreement. *Munro* v. *Butt*, 8 E. & B. 739 (1858).

This case is noteworthy in view of many of the preceding decisions. But it is also of general importance. Thus, if a builder leaves a house uncompleted by a specified time, which completion by such time is a condition precedent to payment, and the builder claims payment for the work done on the ground that the employer has taken possession of the premises, or, more strictly speaking, come into occupation of them, his claim is untenable on the principle enunciated in the above decision. This case may profitably be compared with *Lucas* v. *Godwin*, 3 Bing., N. S. 744.

WARRANTY.

A person who invites tenders for work does not impliedly warrant the correctness of the plans or specifications according to which the work is to be done. *Thorn* v. *The Mayor and Commonalty of London*, L. R., 1 App. Case, 120; 45 L. J., Ex. (H. of L.) 487 (1876).

Neither is there an implied warranty, it would seem, by an architect, quantity surveyor, or engineer, that his

plans are correct. But if one of these persons was proved not to have used reasonable care in the preparation of such plans, so that they were incorrect, and the employer suffered damage in consequence, then an action would be maintainable against such person for negligence and want of skill. Thus, in the case of *Jenkins* v. *Betham*, 15 C. B. 168 (1854), it was decided that one who holds himself out and is employed as a valuer of ecclesiastical property, is bound to bring to his task that ordinary degree of skill and knowledge which would reasonably be expected from country surveyors and valuers. Much less, therefore, is the employer liable for the accuracy of the quantities furnished by the architect to the builder, as was attempted to be proved in the case of *Scrivener* v. *Pask*, L. R., 1 C. P. 715; 18 C. B., N. S. 785 (1865).

WEEKLY ACCOUNTS.

"Weekly accounts of work" mean accounts of day-work only, and not extra work capable of being measured. *Myers* v. *Sarl*, 30 L. J., Q. B. 9 (1860).

In relation to this phrase, "weekly accounts of work," it should be borne in mind that customs die away, and therefore it does not follow that this phrase has this actual meaning at the present time.

WINDOWS.

A bay window is a building, and not a mere projection from a main building. *Lord Manners* v. *Johnson*, L. R., 1 Ch. D. 673 (1875).

Cf. this decision with the previous and similar one of *Western* v. *Macdermott*, L. R., 1 Eq. 499.

APPENDIX.

I. PRECEDENTS OF PLEADING.

1. *Claim by an Architect against an Employer for Work done.*

STATEMENT OF CLAIM.

1. The plaintiff A. B. is an architect residing at .

2. The defendant C. D. is the owner of a certain mansion house named in the county of .

3. In the month of May, 18—, the defendant was desirous of having certain additions made to the said house, and certain alterations in its structure.

4. In the said month of May the defendant requested the plaintiff to make certain plans and drawings for the purpose of carrying out the said additions and alterations, subject to his (the defendant's) approval of the proposed plans and drawings.

5. The plaintiff accordingly visited the said mansion house for the purpose of preparing the said plans and drawings, and did duly prepare the same, and forwarded them to the defendant for his perusal and approval.

6. The defendant approved the said plans and drawings, and requested the plaintiff to obtain tenders for the said work, and have the quantities for the proposed work duly taken out.

7. Subsequent to the approval by the defendant of the said plans and drawings, the plaintiff in the month of June was informed by the defendant that he did not intend to have the said work carried out according to the plaintiff's plans and drawings, and returned the same to the plaintiff.

8. The plaintiff thereupon sent to the defendant an account of his costs and charges in and for the preparation of the said plans and drawings. The said account amounted to the sum of £ .

9. The defendant has refused and continues to refuse to pay the said sum.

The plaintiff claims the sum of £ .

STATEMENT OF DEFENCE.

1. The defendant denies that the said plans and drawings were approved by him as alleged in paragraph 6 of the statement of claim, and he further says that he wrote to the plaintiff as soon as he had perused the said plans and drawings that he could not approve the same.

2. The defendant further says that even if he did approve the said plans and drawings which he denies, the plaintiff's charges for the same are not just and reasonable.

3. The defendant pays into court the sum of £ and says that the same is enough to satisfy the liability (if any) which he may be under to the plaintiff.

4. Save as aforesaid the defendant admits the allegations in the plaintiff's statement of claim.

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2. *Claim of a Builder against an Employer for Work done.*

STATEMENT OF CLAIM.

1. The plaintiff is a builder, carrying on business at L., in the county of Surrey.

2. The defendant is a gentleman of property, residing at W., in the county of Denbighshire.

3. On the 5th of March, 18—, a contract was entered into between the plaintiff and the defendant, whereby the plaintiff agreed to erect and build for the defendant a residence, stables and outbuildings at L., near B., in the county of Surrey, for the sum of £ , extras or omissions to be added or deducted from this amount. Payments on account were to be made by the defendant to the plaintiff from time to time, and the balance within a month from the completion of the works, or from the date of giving

up possession to the defendant, which ever should first happen.

4. The plaintiff built the said residence, stables and outbuildings for the defendant, and executed extra and certain additional works and alterations in connection therewith, amounting to the sum of £ . From that sum were deducted omissions amounting to £ , reducing the amount to £ . The last-mentioned sum being added to the said sum of £ gives a total of £ , payable by the defendant to the said plaintiff.

5. The plaintiff from time to time during the progress of the works received from the defendant various sums, amounting, in the whole, to £ , such last-mentioned amount being deducted from the total sum of £ in the last paragraph mentioned left a balance of £ , which was by the defendant's architect certified to be due from the defendant to the plaintiff.

6. Possession of the said buildings and works was given up to the defendant on the 10th of November, 18—, and the said works have been duly completed.

7. The defendant has subsequently to the commencement of this action paid to the plaintiff £ , still further reducing the amount payable by him to the plaintiff to the sum of £ . The last-mentioned sum is still due and owing from the defendant to the plaintiff.

The plaintiff claims £ .

STATEMENT OF DEFENCE.

1. The defendant denies that his architect certified that there was a sum of £ due from the defendant to the plaintiff, as alleged in the 5th paragraph of the statement of claim.

2. The defendant says as to the sum of £ claimed in this action that he denies that he is or ever was liable to the plaintiff in that amount. The work in respect of which this sum is claimed was not extra work within the meaning of the contract entered into between the plaintiff

and the defendant, and was never authorized by the said architect.

3. Save as hereinbefore denied, the defendant admits the allegations in the plaintiff's statement of claim.

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3. *Claim by a Quantity Surveyor against a Proprietor for Work done.*

STATEMENT OF CLAIM.

1. The plaintiff is a quantity surveyor, and carries on business at , in the city of .

2. The defendant is the owner of an estate in on which there is a mansion called S.

3. In the early part of the year 18— the defendant, who contemplated the erection of extensive buildings at and in connection with S., employed Mr. J. T. of as his the defendant's architect and agent to prepare the necessary drawings and specifications for the said buildings, and with the view of inviting persons to tender for the erection of the same to get the quantities taken out and the usual work of a quantity surveyor done by a quantity surveyor.

4. The plaintiff was employed by the defendant and by the said Mr. J. T. as his the defendant's architect and agent to take out the said quantities and do other work as a quantity surveyor and otherwise for the defendant upon the terms that the plaintiff should be paid for his said services at the rate of two per cent. upon the value of the proposed works, together with travelling expenses, the expenses of lithography, and a small charge for measuring at the house and preparing bill of credits.

5. The plaintiff proceeded to S., and in accordance with the directions of the defendant and the said Mr. J. T. prepared the said quantities, and did other work as a quantity surveyor and otherwise for the defendant. The plaintiff and his surveyors and clerks were engaged for a considerable time in rendering these services, and the plaintiff expended a large sum of money for the defendant in and about the same.

6. The following are the particulars of the work done

by the plaintiff for the defendant and of the plaintiff's charges for the same:—

1875.		£	s.	d.
May, June, July & August.	To attending the defendant's architect and agent, Mr. J. T., receiving instructions; attending at S., ——shire, surveying, preparing, and issuing quantities; attending at S. to point out works to contractors, &c., as follow:—			
Estimate A.—	£15,558 at 2 %	311	15	0
	2 % on £1,000 assumed value of local stone and other materials to be found on the estate	20	0	0
	Lithography and expenses ..	57	13	6
Estimate B.—	£4,750 at 2½ %	118	15	0
	Preparing spot and credit bill and attending at S.	21	0	0
	2 % on £200 assumed as above..	4	0	0
	Lithography and expenses ..	19	12	6
Estimate C.—	£5,534 at 2 %	110	13	0
	2 % £600 assumed as above ..	12	0	0
	Lithography and expenses ..	26	11	0
Estimate D.—	£1,977 at 2 %	39	17	6
	Pricing out bills of quantities, valuing works, and making out estimate as instructed and reporting thereon £28,000 at ¼ %	70	0	0
		£811	17	6

The above charges are at the usual rate, and are fair and reasonable.

7. The plaintiff has applied to the defendant for payment of £811 17*s.* 6*d.*, the amount owing to him, but he has not obtained payment of the same.

The plaintiff claims £811 17*s.* 6*d.* and interest to the date of judgment.

STATEMENT OF DEFENCE.

1. The defendant admits that he employed the said J. T., in the statement of claim mentioned, as his architect

and agent, for the special purposes in the 3rd paragraph of the statement of claim mentioned, but says that the said J. T., as such agent as aforesaid, was only authorized by the defendant to employ a quantity surveyor, upon the terms that the defendant should pay to such quantity surveyor reasonable and fair charges for work which should be done and expenses which should be incurred by such quantity surveyor in or about the taking out of the quantities and the performance of the usual work of a quantity surveyor in respect of the said contemplated buildings, and upon no other terms whatever.

2. The defendant denies that the plaintiff was ever employed by him (the defendant) upon the terms mentioned in the 4th paragraph of the statement of claim.

3. The defendant admits that the plaintiff was employed by the said J. T., acting ostensibly as the agent of the defendant, upon the terms set forth in the said 4th paragraph of the statement of claim, but the defendant was wholly ignorant of the said terms, and has never ratified the same in any way.

4. The charges which were to be made by the plaintiff under the terms of the said agreement in the 4th paragraph of the statement of claim mentioned, are not reasonable and fair charges, but on the contrary, are excessive and exorbitant by the sum of £ ; and in entering into such agreement ostensibly upon behalf of the defendant, the said J. T. exceeded the authority given to him as aforesaid by the defendant in that behalf.

5. Upon learning the terms of the said agreement the defendant at once repudiated and still repudiates the authority of the said J. T. to bind him to such terms, and as to £ , parcel as aforesaid of the monies claimed, the defendant submits and says that he is not liable to pay the same as being excessive and exorbitant, and as to £ residue of the monies claimed, the defendant brings and pays into court the sum of £ , and says that the same is enough to satisfy the claim of the plaintiff in respect thereof.

6. Even if the defendant be liable to pay the charges of the plaintiff upon the terms set forth in the 4th paragraph of the statement of claim, the charges of the plaintiff, as

set forth in the 6th paragraph of the statement of claim, are not in accordance with such terms, inasmuch as the value of the proposed works was much less than is therein stated, and also inasmuch as one of the items of the said charges is calculated after the rate of per cent. instead of per cent. upon the value of certain of the proposed works, and also inasmuch as all the residue of the items of the said charges set forth in the 6th paragraph of the statement of claim are unfair, unreasonable and excessive.

REPLY.

1. The plaintiff joins issue upon the defendant's statement of defence.

2. As to the 5th paragraph of the statement of defence, the plaintiff says that he accepts the sum paid into Court in satisfaction of that part of the plaintiff's claim in respect of which it is paid in.

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4. *Claim by a Builder against an Architect for fraudulently withholding a Certificate.*

STATEMENT OF CLAIM.

1. The plaintiff A. B. is a builder, carrying on business in .

2. The defendant C. D. is an architect, carrying on business in .

3. On the 6th February, 18—, the plaintiff agreed to erect, for one E. F., a dwelling-house at , and to provide for the said E. F. certain materials for the construction of the said dwelling-house.

4. In the contract entered into by the plaintiff and the said E. F., it was agreed (inter alia) that the plaintiff would perform the said work according to a certain specification or schedule, in a sound and workmanlike manner, to the satisfaction of the defendant.

5. And it was further agreed that the plaintiff was to be paid the sum of £ , in two instalments, and that the first of such sums should be paid as soon as the defendant certified by a certificate in writing, to the said E. F., that half the said work had been performed by the plaintiff, according to the specification, in a sound and workmanlike

manner, and the balance as soon as the said work was completed, and the defendant had certified as hereinbefore mentioned.

6. The plaintiff accordingly executed the said work, and erected the said house in accordance with the specification referred to, in a sound and workmanlike manner, and all conditions were fulfilled, and all times elapsed necessary to entitle the plaintiff to receive from the defendant a certificate according to the terms of the said contract, so as to entitle him to obtain the said sums of £ and £ respectively from the said E. F.

7. The defendant has not given the said certificate, but has fraudulently, and in collusion with the said E. F., neglected and refused to give a certificate in accordance with the terms of the contract, entered into between the plaintiff and the said E. F.

8. By reason of the premises the said E. F. refused to pay to the plaintiff the said sums of £ and £ respectively due to him under the said contract, and has only paid the sum of £ , and the plaintiff has been and is unable to recover the balance of the said sums from the said E. F., and the balance remains unpaid and due to the plaintiff.

The plaintiff claims £ damages.

STATEMENT OF DEFENCE.

1. The defendant admits the allegations contained in paragraphs 1, 2, 3, 4 and 5 of the statement of claim.

2. The defendant denies that the said work was executed according to the specification referred to in the contract, or that it was executed in a sound and workmanlike manner.

3. The defendant admits that he has not given a certificate according to the terms of the said contract.

4. The defendant denies that he has fraudulently, or in collusion with the said E. F., withheld the said certificate.

5. The defendant says that the plaintiff executed the said work in such an unsound and unworkmanlike manner that he in good faith and in accordance with the meaning of the said contract withheld his certificate.

6. The plaintiff has received such a sum as is due and reasonable, considering the unsound and unworkmanlike

manner in which he erected the said dwelling-house for the said E. F.

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5. *Claim in respect of a Tender.*

STATEMENT OF CLAIM.

1. In or about the month of , 18—, it was agreed by and between the plaintiff and the defendant that the defendant should execute complete certain works for the plaintiff in such manner, and upon such terms, and within such time, as then agreed upon for the sum of £ .

2. All things were done and happened, and all times elapsed, necessary to entitle the plaintiff to have the said work executed complete by the defendant in accordance with the said agreement as aforesaid.

3. The defendant did not execute complete the said work in accordance with the said agreement as aforesaid, and wholly omitted and refused so to do.

4. By reason of the premises the plaintiff was put to great trouble, expense and delay, in getting the said work executed, and was greatly inconvenienced in carrying on his business.

The plaintiff claims £ .

The plaintiff proposes that this action shall be tried in the county of .

STATEMENT OF DEFENCE.

1. The defendant denies the several allegations contained in the statement of claim.

2. In the month of , 18—, the above-named plaintiff, who was then about to have certain work done at , in the county of , through one H. advertized for tenders for the said work. F., who was then a clerk in the defendant's employ, filled up and sent in to the said H. a tender for the said work at £ if required to be completed in twenty-six weeks, and at £ if required to be completed in eighteen weeks from the time of receiving instructions to commence work. A contract between the plaintiff of the one part, and the builders selected to do the said work of the other part, and containing the terms on which the same was to be executed,

was to be prepared by the plaintiff's solicitors and signed by the plaintiff and such builder.

3. The said tender so sent in was sent in by the said F. without the knowledge or authority of the defendant.

4. The defendant afterwards, before the plaintiff became bound to employ the defendant to do the said work, and before any contract for the execution of the same had been entered into, discovered that a mistake of at least £ had been made in the estimate on which the said tender had been framed, and the defendant thereupon at once withdrew the said tender and declined to enter into any contract upon the basis thereof for the execution of the said work.

5. The defendant after the withdrawal of the said tender, and before the plaintiff had either entered upon the execution of the said work, or had entered into any contract with any other person with respect to the same, explained to the plaintiff the error of £ in the said estimate, and offered the plaintiff to bear one-half of the loss of the said amount, and to enter into a contract for the execution of the said work for £ , being the amount to which the sum of £ mentioned in the said tender would be increased by adding thereto £ the one-half of the said error of £ . The plaintiff, however, refused such offer of the defendant, alleging that he had so far committed himself to Messrs. K., builders, with respect to the employment by the plaintiff of that firm to do the said work that he could not retire from his negotiation with them, and the plaintiff afterwards entered into a contract with the said Messrs. K. for the execution of the said work for the sum of £ , being a sum of £ more than the sum at which the defendant offered and was willing to execute the same.

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6. *Claim for Work done and Commission.*

STATEMENT OF CLAIM.

1. The plaintiff is a surveyor and house and estate agent, and carries on business at , in the city of .

2. The defendants are the owners of a house numbered , in the county of , and during the employment of the plaintiff as hereinafter mentioned employed and

still employ as their (the defendants') agents in and about the management of the said premises, and of the affairs of the defendants in connection with the same, Messrs. W. & J. G., of .

3. In the years , the defendants, through their said agents, employed the plaintiff as a surveyor and house agent, to render certain services and do certain work, and provide materials for the same for the defendants with respect to the said premises, and the plaintiff accordingly rendered the said services and did the said work. Particulars of the said services and work have been already supplied by the plaintiff to the defendants. The plaintiff's charges in respect of the same amount to the sum of £ ; such charges are at the usual and ordinary rate, and are fair and reasonable.

4. The defendants, through their said agents, employed the plaintiff to procure a person who would be willing to become tenant of the said house under a building lease for ninety-nine years, at a ground rent of £ a year, and upon the terms that the plaintiff should be paid by the defendants a commission at the usual rate for procuring such tenant. The plaintiff accordingly did procure a person who was willing to become tenant of the said house under the lease, for the term, and at the rent aforesaid, and the defendants, through their said agents, accepted the said tenant, but afterwards the defendants refused to grant the said lease. The plaintiff, on procuring such tenant, became and was entitled to receive and recover from the defendants the sum of £ , £ being for commission, being equal to one year's ground rent of the said premises, and £ , being at the rate of £ per centum on the value of the old materials, valued at £ . Such commissions are at the usual and ordinary rate for such services as those in the paragraph hereinbefore mentioned, and are fair and reasonable.

5. The defendants, through their said agents, employed the plaintiff to procure a person who would be willing to purchase the fee-simple of the said house, , at the price of £ , and upon the terms that the plaintiff should be paid by the defendants a commission at the usual rate for procuring a person willing to become such pur-

chaser. The plaintiff accordingly, after the expenditure of much time, labour and money, did procure a firm of persons who were willing to purchase the fee-simple of the said house at the said price of £ , but the defendants afterwards refused to sell the same. The plaintiff, on procuring such purchaser, became and was entitled to receive and recover from the defendants the sum of £ for commission, being at the rate of £ per centum on the amount of the purchase money. The said rate of £ per centum is the usual rate for such services as those in the paragraph hereinbefore mentioned. The said charge is also fair and reasonable.

6. The plaintiff was employed by the defendants, through their said agents, to prepare for the defendants architectural plans and drawings for the buildings to be erected under the said building lease in the 4th paragraph mentioned, the plaintiff's charge for the same being by agreement between the plaintiff and the defendants, through their said agents, fixed at the sum of £ . The plaintiff accordingly did prepare such plans and drawings for the defendants, and is entitled to receive and recover from the defendants the said sum of £ .

7. The services in the 4th, 5th, and 6th paragraphs hereinbefore mentioned are different from and in addition to those mentioned in the 3rd paragraph.

8. The sum due from the defendants to the plaintiff, and in the said 3rd, 4th, 5th and 6th paragraphs mentioned, amount in the whole to the sum of £ , out of which the defendants have paid to the plaintiff £ , leaving £ still due and owing to him.

9. The plaintiff has applied to the defendants for payment of the said sum of £ , but has been unable to obtain payment of the same.

The plaintiff claims £ .

The plaintiff proposes that this action should be tried in the county of .

STATEMENT OF DEFENCE.

1. The defendants deny that they employed the plaintiff for the purposes and on the terms alleged.

2. As to the plaintiff's 3rd paragraph the defendants

deny that the plaintiff rendered the said services and did the said work.

3. As to the 3rd, 4th and 5th paragraphs of the plaintiff's statement the defendants deny that the said charges are fair, reasonable and usual.

4. As to the plaintiff's 4th paragraph the defendants deny that the plaintiff procured a person willing to become such tenant as alleged.

5. As to the plaintiff's 5th paragraph the defendants deny that the plaintiff did procure persons who were willing to purchase as stated.

6. As to the plaintiff's 6th paragraph the defendants deny that the said plans and drawings or any of them were prepared, or that the charge was fixed and agreed.

7. As to the plaintiff's 7th paragraph the defendants say that the alleged services and work in the plaintiff's 3rd paragraph mentioned are parcel of and included in the transactions set out in the plaintiff's 4th, 5th and 6th paragraphs, and that the plaintiff is not entitled to be paid separately in respect of the same, but only upon the terms as to the time and mode of payment and otherwise hereinafter set out with reference to the said last-mentioned transactions.

8. For an alternative defence to the said 3rd paragraph the defendants say that when the defendants engaged the plaintiff as therein alleged and before the commencement of this action, it was mutually agreed between themselves and the plaintiff that the plaintiff's charges in respect of the said services and work so far as the same relate to business done with reference to the dilapidations hereinafter mentioned, should be payable only out of money thereafter to be recovered from the personal representatives of one J. L. for dilapidations done to the said premises during the tenancy of the said J. L. and the money has not nor has any part thereof been recovered.

9. And for a further alternative defence to the said 3rd paragraph the defendants say that the said services and work were rendered and done upon the terms that the plaintiff should be entitled to be paid in respect thereof, upon the completion of the several matters and transactions in and about which the same were respectively rendered

and done, and not otherwise; and the defendants say that at the commencement of this action the said matters and transactions were not nor was any of them completed with the exception of certain matters and transactions in respect of which the plaintiff's lawful and reasonable charges amounted to £ , which sum has been already paid to him as admitted in the 8th paragraph of his statement of claim.

10. As to paragraph 4 of the statement of claim, the defendants say that they employed the plaintiff as alleged upon the express terms that he should be paid no commission in that behalf before and until he had procured a fit and proper person who should be willing and able to become, and who should become, tenant of the said premises upon the terms specified, and the plaintiff has not in fact procured such a person as tenant. The defendants admit that the plaintiff did procure a person who at one time offered to become such tenant; but they say that such person was not a fit and proper person within the meaning of the said proviso, nor was he willing or able to become tenant of the said premises as alleged. The said person in fact neglected and refused to become such tenant, and wholly repudiated his said agreement, and the defendants thereupon, with the consent of the plaintiff, rightfully refused to accept the said person as tenant, or to grant him the said lease.

11. As to the 6th paragraph, the defendants repeat that they did not agree to pay the plaintiff for the said plans and drawings the sum of £ or any other sum. They further say that the plaintiff, without the authority of the defendants, employed certain third persons to prepare the said plans and drawings, and thereby incurred much unnecessary and unreasonable expense in and about the same, whereas the plaintiff was himself bound to prepare, and could or ought to have prepared, the said plans and drawings for a much less sum. The defendants therefore say that if they are indebted at all in that behalf, which they do not admit, it is in a much less sum than £ .

12. And for an alternative defence as to the 3rd, 4th, 5th and 6th paragraphs, the defendants say that at the time of the employment of the plaintiff it was agreed between

themselves and the plaintiff that the plaintiff's charges and commission (if any) in respect of the said premises, except the said £ , should be chargeable against and recoverable from the lessee or purchaser thereafter to be procured by the plaintiff, or should be payable out of the ground rent or purchase-money thereafter to be received by the defendants from such lessee or purchaser, and not otherwise; and by reason of the premises the defendants are not liable to pay the plaintiff's claim herein, or any part thereof.

II. AGREEMENTS AND LEASES.

AGREEMENTS.

1. *Contract between Builders and a Landowner for the Erection of Houses according to Specifications.*

1. An Agreement made, &c., between A. B., of, &c., and C. D., of, &c. (hereinafter called the builders) of the one part; and E. F., of, &c. (hereinafter called the landlord) of the other part.

2. The builders will, for the sum of £ , to be paid to them by the landlord as hereinafter mentioned, build and completely finish for the landlord, at , and on such site there as shall be pointed out by the landlord's architect for the time being, a terrace consisting of houses, according to the plans, elevations, sections, and specification which have been prepared for the same, and signed by the builders, and such explanations and directions as the architect shall give for the purposes of the works.

3. Until the landlord otherwise determines, G. of , shall be his architect for the purposes of this contract.

4. No deviation from the plans, elevations, sections, or specification, and no extra or additional work shall be begun until after the builders shall have received from the landlord authority in writing under his hand for the same, and if begun without such authority, shall be considered as done gratuitously and solely for the satisfaction of the builders.

5. The builders will commence the works mentioned in the said specification immediately on receipt of an order to that effect from the landlord, or his architect for the time being, and will execute the various parts and portions of the said works within the respective times fixed in that behalf by the specification, and will finally complete the whole of the works and clear away all unused materials and rubbish within weeks after the receipt of such order, and in default thereof will pay to the landlord for every week's delay after the respective times aforesaid during which any of the said parts or portions of the said works may remain uncompleted, or the said works may remain unfinished, or the said materials and rubbish shall remain on the land, a sum of £ (and so in proportion for any less period than a week) as liquidated damages, and the amount of such liquidated damages may be deducted by the landlord from any money payable to the builders under this contract, as if the same had been money paid to the builders on account. Provided always, that if the completion of the works shall be interrupted by a general strike of the workmen employed thereupon by the builders, or by their refusal to work for the builders at the ordinary wages or during the usual hours, then the period during which the works shall necessarily be interrupted by such strike or refusal shall not be reckoned within the said weeks, and the time allowed for completion of this contract shall be extended accordingly.

6. The builders will in every respect execute and finish all the works described in or implied by the said specification, and observe the terms of the specification, and fulfil their part of this contract to the entire satisfaction of the said architect for the time being, and they will also execute any alterations or additions which may be ordered by the architect. But if they consider that any such alteration or addition will involve extra cost after allowing for any omissions which may have been or may be ordered at the same time, they shall not be bound to execute the same without the written order of the landlord, which order shall contain the price which has either been agreed on, or in the opinion of the architect ought to be allowed for the same, and the builders shall not in any event be entitled

to receive more than the said sum of £ , together with such sums (if any) as may be specified in such orders as aforesaid.

7. The builders shall personally superintend the execution of the works, and shall not employ any sub-contractor for the execution of the same, or any part thereof, without the previous authority in writing of the landlord.

8. The builders shall keep on the premises a competent foreman; and all notices and orders for the builders may be given to such foreman or to any person who from time to time may appear to be the foreman of the works; and if either the foreman or any of the workmen employed shall be considered by the architect incompetent or shall misbehave himself, he shall be discharged, and may be excluded from the premises.

9. The architect may reject any materials which he considers unfit to be used, or of a quality inferior to that mentioned in the specification, and may require any work to be undone and redone which has been done imperfectly.

10. All materials brought upon the premises by the builders shall immediately thereupon become the property of the landlord.

11. The builders shall observe, perform and comply with all the regulations and orders of the local authorities for the time being relative to the said premises, or the mode of executing the works.

12. The builders shall be responsible for and make good all loss, injury, or damage to the land, or to the owners or occupiers of any adjoining land or buildings done by them or their workmen, or which they might have prevented, until the completion of the works, and shall deliver up the said works complete and in perfect order and condition within the time aforesaid.

13. The architect shall be the sole judge upon all matters relating to the construction, incidents, and consequences of the plans, elevations, sections, and the said specification, and of this contract respectively [except as to the matters of account mentioned in the clause of this contract], and his certificates in writing shall, so far as they respectively extend, be binding and conclusive on both parties,

but he may from time to time by any subsequent certificate modify any preceding certificate.

14. Notwithstanding any such certificate, if any defect shall afterwards be discovered, or if anything afterwards shall be found to have been done not according to the specification or this contract, no further payment (if any shall be due) shall be made to the builders until three calendar months after such defective work shall have been replaced by new work as good as it ought to have been originally. And if any defect shall be discovered within a year after the completion of the works, the same shall be made as good as it ought to have been originally, either by the builders, or, at the option of the landlord, by other builders or workmen, and the cost thereof shall be paid by and recoverable from the builders.

15. If the builders become bankrupt, or compound with their creditors, or neglect or fail or become unable to proceed with the works as directed by the architect (unless the work shall be interrupted by such a general strike or refusal to work as aforesaid), the landlord may, after a certificate from the architect to that effect, get the work done by other builders or workmen as he shall think fit, and the builders and their assignees shall thereupon forfeit all claim to further payment under this contract, except to such balance (if any) as shall remain out of the said sum of £ after the completion of the work by such other builders or workmen, and the builders or their assignees shall not be at liberty to remove any scaffolding, tackle, or plant from the premises until the same shall cease to be required.

16. The landlord will, according to this contract, pay to the builders for the works the sum of £ , as follows (that is to say), when and not before the architect shall have certified that one-fourth of the work has been done, then such a sum as he shall have certified to be three-fourths of the contract value of the work done; and when and not before he shall have certified that one-half of the work has been done, then such a sum as he shall have certified to be three-fourths of the contract value of the work done and not referred to in his former certificate; and when

and not before he shall have certified that three-fourths of the work have been done, then such a sum as he shall have certified to be three-fourths of the contract value of the work done and not referred to in either of his former certificates; and when and not before he shall have certified that the works have been completed, then such a sum as he shall have certified to be three-fourths of the contract value of the work done and not referred to in any of his former certificates: and at the expiration of three calendar months from the completion of the works, such a sum as he shall certify to be the balance then payable to the builders according to this contract.

17. The architect shall, in making such certificates, take into consideration any deviation, or extra or additional work done in accordance with this contract, and any liquidated damages and other sums to be paid or borne by the builders, and shall charge or allow for the same accordingly; and all such damages and sums may be retained by the landlord out of the said sum of £ .

18. The architect shall not give any such certificate in respect of any work not done in all respects to his entire satisfaction, nor while the builders fail to comply with any of his directions, or make any delay in his opinion needless in proceeding with the works.

19. The landlord shall not be bound to make any payment to the builders except upon production of a certificate by the architect that the money is due and payable to the builders.

20. Until the contract shall be performed, the architect shall have the custody of the plans, elevations, sections, specifications, and schedule of prices, and of this contract, on behalf of all parties concerned, and when the contract shall have been performed shall deliver the same to the landlord.

21. All costs, damages, and expenses of and incident to the complete fulfilment of this contract on the part of the builders shall be borne and paid by them exclusively, it being the intent of the parties hereto that the landlord shall be liable only to make the payments hereby expressly contracted to be made by him.

2. AGREEMENT *for separate Leases to two Builders, or their Nominees, of several parcels of ground upon the Landlord's estate, granting Right of Entry to the tenants to execute the stipulated works. Tenants to complete the houses within certain specified times, but the Landlord to have the option of deferring the Grant of the several Leases until a particular day. Leases to contain specified covenants and provisions. Proviso for determining the Agreement as to any particular Parcel of Ground, if Tenants fail to perform it.*

An Agreement entered into the day of , 18 , between A. B., of, &c. (hereinafter called the landlord), of the one part, and C. D., of, &c., and E. F., of, &c., builders (hereinafter called the tenants), of the other part.

1. During calendar months from the date hereof, the tenants, for the purpose only of building and executing works in the manner and to the extent hereinafter stipulated, may enter upon all those several parcels of ground situate in the parish of in the county of , on the side of the road leading from to , as the same are delineated upon the plan drawn in the margin hereof, whereon they are respectively distinguished by the numbers 1, 2, &c., and the boundaries thereof are denoted by lines coloured , and the sites of the dwelling-houses hereinafter agreed to be built, are denoted by the colour .

2. Within calendar months from the date hereof the tenants will build and cover in on the said parcel of ground, numbered 1 on the said plan, a good and substantial carcase of a dwelling-house, with proper vaults, areas and drains thereto, conformably to the plans, elevations and sections thereof to be provided by the landlord's surveyor for the time being, and in accordance with the directions of such surveyor, and with any further explanatory drawings which he may seem fit to issue from time to time.

3. Within calendar months from the date hereof the tenants will completely finish the said dwelling-house, and erect and completely finish stables and a coach-house

thereto, conformably to plans and elevations to be provided by such surveyor.

[*Here insert similar provisions as to the other parcels of ground, with any variation which may be necessary.*]

4. As to each of the said parcels of ground, within the period hereinbefore limited for the completion and finishing of the buildings to be erected thereon, the tenants will enclose the same [*here insert the particular mode of inclosure*].

5. The tenants will execute the whole of the said buildings and works in conformity with the conditions specified in the first schedule hereto.

6. The landlord and his surveyor for the time being may, at all reasonable times, enter upon the said premises, or any part thereof, to view and survey the works hereby agreed to be executed and the materials to be therein used, such surveyor to be paid by the tenants the usual and proper fees of a surveyor for supplying the drawings, superintending the several works, and giving certificates of the completion thereof.

7. No part of the said several parcels of ground shall be dug out deeper than required for the several buildings and drains and the road to be made as hereinafter mentioned, and no earth, clay, sand, loam or gravel dug out shall be sold or disposed of, nor shall any be removed from the premises, except such as it shall be found convenient to remove for the performance of the works, and no bricks shall be made or burnt upon the said premises.

8. As to each of the said parcels of ground, when the carcase of the dwelling-house and buildings to be erected thereon, together with the vaults, areas and drains belonging thereto, shall have been built, covered in and constructed to the satisfaction of the landlord's surveyor for the time being (but not before the day of , 18 , if the landlord shall desire to defer the actual grant of leases until that day), the landlord will by deed grant to the tenants or their nominees, and the tenants or their nominees will (without requiring or investigating the lessor's title) accept a lease of such parcel of ground, with the dwelling-house and buildings thereon (saving and reserving out of the lease the free passage, through the sewers and

drains in and upon the premises, of water and soil to and from all or any of the said several other parcels of ground hereby agreed to be demised and the dwelling-houses and buildings to be thereon erected, and to and from all or any other lands and hereditaments adjoining or in the neighbourhood of the premises belonging to the landlord): For a term of years, from the day of , 18 , at the yearly rent of a peppercorn for the first years, and of £ for every subsequent year of the said term, payable by equal quarterly payments on the usual quarter days, the first payment thereof to be made on the day of , 18 , and the last to be made in advance one calendar month before the expiration of the said term: And at the further rent, in the event of and immediately upon the said term being determined by re-entry under the proviso to be inserted in the said lease, of a proportionate part of the said yearly rent for the fraction of the current quarter up to the day of such re-entry; the said rents to be payable notwithstanding the lease may not have been granted, and to be paid without any deduction.

9. Each lease to be so granted shall contain the following covenants and provisions, namely—joint and several covenants by the tenants or their nominees, to pay the said rents on the days and in manner aforesaid: And to pay all existing and future taxes, rates, assessments and outgoings of every description for the time being payable either by landlord or tenant in respect of or charged upon the premises: And to pay a fair and just proportion of all expenses and charges for making, renewing and repairing roads or pathways, and making, renewing and cleansing or repairing sewers, drains and water-courses which shall be used in common by the occupiers of the said premises and the occupiers of any dwelling-houses erected or thereafter to be erected on any part of the estate of the landlord adjoining or contiguous thereto, such proportion to be settled by the landlord or his surveyor for the time being, he, the landlord, or his under-tenants, contributing a like rateable proportion thereto: And covenants, so far as applicable to the premises to be demised, to the effect of such of the agreements by the tenants hereinbefore contained as shall not have been completely performed: And covenants

by the tenants or their nominees, so far as applicable to the premises, to the purport or effect following (that is to say): To [*repair, post,* p. 86]: And particularly to [*paint, post,* p. 87], And to [*permit landlord to enter, and that tenants will repair upon notice, post,* pp. 87, 91]: And to form along the front of the said parcel of ground a new roadway feet wide, with a footpath feet wide, on the side adjoining the same parcel of ground, the road and pathway to be properly made with chalk or bavins and gravel to the satisfaction of the surveyor for the time being of the landlord, the road to slope nine inches from the crown to the water-tables, and the pathway to slope two inches towards the water-tables, and also to contribute a due proportion of the expense of repairing the said road and pathway: And to insure and keep insured during the said term the buildings for the time being on the said parcel of ground, to the amount at least of two-thirds of the value of the same buildings when completed, in some respectable office for insurance against damage by fire, to be approved by the landlord, in the joint names of the landlord and of the tenants or their nominees (which insurance of the buildings to be from time to time erected the tenants hereby agree to effect and keep on foot to the amount aforesaid, until the respective leases shall be granted as aforesaid) [*and to produce policies and receipts for premiums, post,* p. 87]: And to lay out or permit to be laid out any monies which may from time to time be received by virtue of such insurance in rebuilding, repairing and reinstating such buildings as shall be destroyed or damaged by fire, and also to expend, out of their own monies, all such further sums (if any) as may be necessary to reinstate the premises: And not to permit or suffer to be exercised or carried on upon any part of the said premises any trade or business whatsoever, or anything of the nature thereof, without the licence in writing of the landlord, or be parties to any act or thing which may be or grow to the annoyance, damage or inconvenience of the neighbourhood, or of the lands of the landlord adjoining or near to the premises: And that every assignment operating as an absolute disposition of the lease shall, within three calendar months after the date and execution thereof, be produced to the landlord

or his solicitor for the time being, for the purpose of showing in whom the premises may be from time to time vested, and enabling the person or persons to whom such assignment shall be shown to take down the particulars thereof at the expense of the party or parties making or taking the same, such expense of taking down the particulars not to exceed the sum of guineas for each assignment: And [*to deliver up the premises at the end of the term, post*, p. 87]: And also a proviso for re-entry in case any part of the rent shall be in arrear for twenty-one days (whether legally demanded or not), or if there shall be a breach of any of the tenants' covenants or agreements: And also the usual qualified covenant by the landlord for quiet enjoyment by the tenants or their nominees.

10. The tenants or their nominees will execute and deliver to the landlord a counterpart of every lease so to be granted as aforesaid.

11. The several leases and counterparts shall be prepared by the solicitor of the landlord. All expenses attending the preparation and execution by all parties of this agreement in duplicate shall be borne by the tenants: and all expenses attending the preparation, engrossment and execution by all parties of the said several leases and counterparts shall be borne by the tenants or their nominees.

12. In case the dwelling-house hereby agreed to be built as aforesaid on any of the said respective parcels of ground hereby agreed to be demised shall not be built and covered in on or before the day or time and in the manner herein mentioned and appointed for the same, with the vaults, areas and drains thereto as herein provided, or if the tenants or their nominees shall neglect or refuse to accept the lease thereof or to execute a counterpart of such lease or to pay the reasonable charges for preparing, engrossing and executing the same within one calendar month next after they shall be requested so to do, the landlord may immediately thereupon re-enter upon and take possession, for his own use and benefit, of the parcel of ground and premises in relation to which or to the lease whereof there shall be such default, neglect or refusal, and these presents, so far as regards the same parcel of ground and premises only, shall thereupon absolutely determine, it being the

intention of the parties hereto that time shall be deemed of the essence of this agreement, but the avoidance of this agreement in manner aforesaid as to any of the said parcels of ground and premises in relation to which or to the lease whereof there shall be such default, neglect or refusal shall not prevent this agreement from remaining in force as to any of the said parcels of ground and premises in relation to which or to the lease whereof no such default, neglect or refusal shall have occurred.

13. In case the landlord, in consequence of the tenants making default in erecting and completing the said dwelling-houses or any of them in the manner hereinbefore stipulated (and whether under such circumstances as shall authorize the landlord to determine this agreement wholly or in part, or not), shall at any time or times think fit to remove the tenants from the further erection of or interference with all or any of the said dwelling-houses then remaining incomplete, the landlord may do so upon the terms next hereinafter mentioned, that is to say, a notice in writing from the landlord to the tenants shall be served upon the latter, or left at their or one of their last known places or place of abode in England, specifically pointing out the default on the part of the tenants which shall have taken place, and if the surveyor for the time being of the landlord shall certify in writing that such default has not been remedied within the space of one after such notice as aforesaid, then and in such case the landlord may thereupon remove the tenants from the further erection of or interference with all or any of the said dwelling-houses and buildings then remaining incomplete (notwithstanding that a lease or leases thereof may have been actually granted and may employ any other builder or builders or other persons to finish the same, and pay him or them for so doing, and the moneys so paid in respect of any of the said dwelling-houses shall be the first charge thereon, and the same premises may be sold by the landlord to pay such charge without regard to the moneys which may have been expended thereon by the tenants: and the landlord may call in such surveyor as he shall think proper to make out a list of and to estimate the price or value of such building materials as shall be then upon the parcel or parcels of

ground, from the erection of or interference with the buildings on which the tenants shall be so removed as aforesaid, and as shall not have been already used for the said buildings, and may thereupon, if he shall think proper, use the same materials, and also all plant belonging to the tenants, upon such parcel or parcels of ground, for and towards the completion of the said dwelling-house or dwelling-houses and buildings, paying the tenants for the same materials and for the use of the same plant at the price or prices at which the said surveyor shall value the same respectively, but such price shall not, as to any of the said dwelling-houses, become payable to the tenants until the expiration of six calendar months from the time of the completion of the same dwelling-houses and buildings.

14. If any dispute, question, difference or controversy shall arise between the parties to these presents, or their respective heirs, executors, administrators, or assigns touching these presents, or any clause, matter or thing herein contained, or the construction hereof, or any thing to be done under any of the agreements herein contained, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties or liabilities of either party in connection with the premises, then and in every or any such case the matter in difference shall be referred to two arbitrators or their umpire pursuant to and so as with regard to the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof.

15. These presents are intended until the leases of the said parcels of ground respectively shall be executed, to create a strict tenancy at will on the part of the tenants in respect of the same parcels respectively upon the terms aforesaid, and also to entitle the landlord to the like power and remedy, by distress or otherwise, for the recovery of the rent or respective rents to become due under these presents, as if such lease or leases had been actually granted, and such rent or rents been reserved thereby and had become in arrear.

As witness, &c.

[SCHEDULE.

THE SCHEDULE ABOVE REFERRED TO.

Conditions in conformity with which the buildings and works are to be erected and executed.

[Here insert the conditions applicable to the case.]

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3. AGREEMENT *for Leases of Parts of an Estate within the limits of the Metropolitan Building Acts, for the purposes of laying out Streets and Building Houses thereon. Reservation of Fixed Rents previous to the Execution of the Leases, and Provisions for the Apportionment of the Rent when the Leases are granted. Power of Re-entry on Non-payment of Rent, or Breach of the Agreement.*

An Agreement entered into this day of , 18 , between A. B., of &c., and C. D., of &c. (hereinafter called the landlords), of the one part, and E. F., of &c., and G. H., of &c., builders (hereinafter called the tenants), of the other part.

1. Within years from the date hereof the tenants will, at their own expense, lay out and form upon the parcels of ground described in the first schedule hereto and delineated in the plan hereto annexed, and thereon distinguished as to the different parts by the colours brown, pink, and blue, the several streets shown as intended streets in the said plan, and therein coloured brown, with proper main sewers and drains in or under the same, and they will at all times during the term of ninety years from the day of , 18 , or until the same streets, drains and sewers respectively shall be demised in pursuance of the agreement in that behalf hereinafter contained, or shall be adopted by the parish or public, at their own expense, keep the same in good order and repair.

2. Within years from the date hereof, the tenants will, at the like expense, erect and build houses on the whole of the ground coloured pink on the said plan, with proper drains and sewers therefrom into the said intended main sewers or drains, or into some other convenient main sewers or drains; such houses to be not less than in number, and to be either substantial dwelling-houses of the fourth rate or class of building containing four rooms,

or dwelling-houses or shops of such other description as may be approved of by the landlords, and to be finished fit for occupation within the time aforesaid.

3. If the tenants shall at any time or times think fit to erect and build houses on all or any part of the ground coloured blue on the said plan, they may do so, and in such case they shall erect and build such houses with proper drains and sewers therefrom into the said intended main sewers or drains, or into some other convenient main sewers or drains, and the same shall be either substantial dwelling-houses of the fourth rate or class of building containing four rooms, or dwelling-houses or shops of such other descriptions as may be approved of by the landlords.

4. If the tenants shall at any time or times think fit so to do, they may lay out and form streets upon the parcels of ground distinguished in the said plan by the colour brown, and not marked as intended streets, or any of them, with proper main sewers or drains in or under the same; and if the same shall be so made, they shall at all times during the said term of ninety years, or until the said last-mentioned streets, drains and sewers respectively shall be demised in pursuance of the agreement in that behalf hereinafter contained, or shall be adopted by the parish or public, at their own expense keep the same in good order and repair.

5. The tenants will lay out and form all such streets and main and other sewers and drains, and erect and build all such houses as aforesaid (whether of the said fourth rate or class or otherwise, and whether it is herein made compulsory or left optional to build the same), in compliance with the provisions of The Metropolis Local Management Act, 1855, and of The Metropolitan Building Act, 1855, and of all statutory modifications thereof respectively for the time being subsisting, and with the provisions and specifications in that behalf contained in the second schedule hereto, and under the superintendence and to the satisfaction of the surveyors for the time being of the landlords.

6. The tenants shall not carry on or commit or permit to be carried on or committed on any part of the said parcels of ground, or in any building or erection thereon, any

manufacture of an obnoxious character, or any noisy, noisome or offensive trade, business or occupation, or any nuisance, nor shall they get, dig or remove out of or from the said parcels of ground any clay, sand, loam, gravel, brick or other earth, except such as shall be excavated in the formation of the said streets, sewers and drains, and of the foundations of the said houses, or shall be required for the construction of the drains, sewers, houses, walls and erections aforesaid.

7. The tenants will in the meantime and until a lease or leases shall have been granted, in pursuance of the agreement in that behalf hereinafter contained, of the whole of the said parcels of ground, or of so much thereof as shall not be adopted by the parish or public for streets, ways or other public places, pay unto the landlords the several yearly rents following, that is to say, for the first three years from the day of , 18 , the sum of £ ; for the fourth year from the same day, the sum of £ , &c., &c.; and for the tenth and every subsequent year from the same day the sum of £ ; each of such yearly rents to be paid by four equal quarterly payments on the four usual quarter days in every year, and the first of such quarterly payments of the said rent of £ [*the minimum rent*], to be made on the of , 18 , but so nevertheless that from the yearly rent for the time being payable under this present agreement, there shall always be deducted the yearly rent or rents (if any) which shall for the time being have been reserved and become payable under any lease or leases which shall then have been granted in pursuance of the agreement in that behalf hereinafter contained, and so that if the rent or the total sum of the rents which shall at any time have been reserved and become payable upon any such lease or leases shall be equal to or exceed the rent for the time being payable by virtue of this present clause or provision, such last-mentioned rent shall wholly cease.

8. The dwelling-houses, buildings and offices now on the said parcels of ground shall not be removed until the surveyors for the time being of the landlords shall have certified that sufficient buildings have been erected to

secure the said yearly rent of £ [*the maximum*], so agreed to be paid as aforesaid.

9. The tenants may enter into possession of the said parcels of ground described in the said first schedule hereto and delineated in the said plan for the purpose of carrying into execution the several agreements by them hereinbefore contained, and with all rights and powers necessary or expedient for such purpose, and particularly with power (after such certificates as aforesaid in that behalf shall have been made) to pull down the said messuages, buildings and offices now on the said parcels of ground, and to make use of or sell and dispose of the materials thereof for the purpose of the new erections or buildings.

10. The landlords will from time to time or any time after the said streets and main sewers and drains, which it is hereinbefore made obligatory on the tenants to form and make, shall have been formed and made as aforesaid, at the expense of the tenants, when and as often as any ten houses shall have been erected, built and covered in to the satisfaction of the said surveyor, and according to the agreements hereinbefore contained, grant one or more lease or leases of the same and of the sites thereof, and of the intended yards, gardens, forecourts and outbuildings thereto, and such streets or portions of streets as are hereinafter mentioned, but so that not more than ten houses shall be comprised in any such lease, and that every such lease shall be for a term which shall expire (unless sooner determined by surrender, re-entry, forfeiture or otherwise) on the day of , 18 , and shall be as nearly as circumstances will admit, and with such alterations and additions (if any) as circumstances shall require, in the form, and contain the exceptions, reservations, covenants, agreements and stipulations set forth and specified in the third schedule hereto.

11. Except as to houses facing Lane, every such lease shall comprise at least one equal moiety of so much of the street in which the premises therein comprised are situate as shall immediately adjoin such premises, and if any such lease shall comprise houses on both sides of any such street, then the entirety of the street lying between such houses; but in all cases with powers, exceptions and

reservations for the use by other persons as in the said third schedule hereto is expressed of the said several streets and of the drains in or under the same, and in the case of the entirety of any street being included in any such lease as aforesaid, so much of the said form of lease comprised in the said third schedule as may be necessary shall be altered and made applicable accordingly.

12. The rent to be reserved in and by every such lease as aforesaid of any house or houses which it is hereinbefore made obligatory on the tenants to erect and build, shall bear the same proportions to the said rent of £ [*the maximum*] hereinbefore made payable as the area of the land (including the sites of houses and buildings and streets) demised by such lease shall bear to square yards, the total area of the whole of the said parcels of ground described in the said first schedule hereto and delineated in the said plan hereto annexed, so that when all the said intended leases of the said houses lastly hereinbefore referred to shall have been granted the total rents thereby reserved shall amount to the said sum of £ [*the maximum*]: Provided nevertheless that the tenants may require the said rent of £ to be unequally distributed among the several leases aforesaid, but so that the rent reserved on any such lease shall not exceed one equal sixth part of the clear yearly rack-rent of the houses and hereditaments comprised in such lease when fit for habitation.

13. The tenants will, when and so often as there shall be ten houses erected, built and covered in, of which no lease shall have been granted, apply for and accept one or more such lease or leases as aforesaid of such houses with the appurtenances as aforesaid without requiring the lessors to show their titles to grant the same, and duly execute a counterpart or counterparts of such lease or leases and a memorial or memorials thereof for registration. And all such leases, counterparts and memorials as aforesaid shall be drawn and engrossed by the solicitors of the landlords, and the tenants will pay the costs of so drawing and engrossing the same, and of obtaining the execution thereof by all parties, and of registering the same,

and all other expenses of and relating to every such lease and to the premises (including the charges and expenses of preparing and obtaining the execution of these presents in duplicate and registering the same), and likewise all fees and other moneys which may become payable to any district or public surveyor in respect of the premises, and a fee of £ to the surveyor for the time being of the landlords, on his giving a certificate previous to a lease being granted of any part or parts of the premises for each of the messuages to be comprised therein, as his remuneration for previously and subsequently superintending the erection and completion thereof and seeing that the same is erected conformably to the agreements hereinbefore in that behalf contained, and in addition thereto his proper and usual charges for making and preparing a ground plan of the property demised, and drawing the same on every such lease, counterpart and memorial.

14. If any part of the yearly rent which under or by virtue of these presents shall for the time being be payable by the tenants until leases shall have been granted in pursuance of the provisions in that behalf hereinbefore contained of the whole of the premises hereby agreed to be demised shall be in arrear for ten days, whether legally demanded or not, or if there shall be a breach of any of the tenants' agreements hereinbefore contained, then and in either of such cases the landlords may re-enter on the whole of the premises then remaining to be demised, and repossess and enjoy the same as if these presents had not been entered into.

15. [*Arbitration clause, ante,* p. 78.]

16. [*Ante,* p. 78.]

As witness, &c.

THE FIRST SCHEDULE above referred to.

(*To contain the description of the premises.*)

THE SECOND SCHEDULE above referred to.

(*To contain the specifications, &c.*)

THE THIRD SCHEDULE above referred to.

(*To contain the form of lease.*)

LEASES.

4. LEASE *to Builders of Houses erected by them upon Land within the limits of the Metropolitan Building Acts.*

This Indenture made the day of , 18 , between A. B., of &c., and C. D., of &c. (hereinafter called the lessors), of the one part, and E. F., of &c., and G. H., of &c. (hereinafter called the lessees), of the other part, Witnesseth that in consideration of the moneys which have been expended by the lessees in the construction of the dwelling-houses and hereditaments hereinafter expressed to be hereby demised, and in consideration of the rent hereinafter reserved, and of the covenants by the lessees hereinafter contained, the lessors do hereby demise unto the lessees, their executors, administrators and assigns: All that parcel of ground situate on the side of a new street called Street, in the parish of , in the county of Middlesex, as the same is delineated in the plan drawn in the margin of these presents and therein coloured , and all those newly erected dwelling-houses now standing on part of the same parcel of ground and distinguished in the said plan by the colour : And also all that other parcel of ground delineated in the same plan and therein coloured , and being one equal moiety of the said street, together with full right of passage for all persons, carriages and animals to and from the said first-mentioned parcel of ground and dwelling-houses over the other moiety of the said street, and over all other neighbouring streets belonging, in possession or reversion to the lessors: And together with full right of passage and running of water and soil from the said first-mentioned parcel of ground and dwelling-houses through the main sewer or drain which runs under the said street, one equal moiety whereof is hereinbefore expressed to be hereby demised: Except nevertheless and reserving full right of passage over the said moiety hereinbefore expressed to be hereby demised of the said street, for the lessors, their heirs and assigns, and for all other persons and all carriages and animals to and from all neighbouring lands and houses belonging in possession or reversion to the lessors: And also full right of passage and running of water and soil from all such neighbouring lands and houses

as aforesaid, through the main sewer or drain aforesaid, and through all other drains, channels and sewers in or under the said parcels of ground hereinbefore expressed to be hereby demised or either of them: To have and to hold the premises hereinbefore expressed to be hereby demised unto the lessees, their executors, administrators and assigns for the term of years, from the day of , 18 : Yielding and paying therefor during the said term the yearly rent of £ , by equal quarterly payments on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, the first of such quarterly payments to be made on the day of , 18 , and the last quarterly payment to be made in advance on the day of next immediately preceding the expiration of the said term hereby granted: And yielding and paying, in the event and immediately upon the said term hereby granted being determined by re-entry under the proviso hereinafter contained, a proportionate part of the said rent for the fraction of the current quarter up to the day of such re-entry; the said rent to be paid clear of all deductions: And the lessees do hereby for themselves, their heirs, executors, administrators and assigns, and as a separate covenant each of them doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessors, their heirs and assigns, that they the lessees, their executors, administrators or assigns will during the said term pay the rent hereinbefore reserved on the days and in manner aforesaid: And will during the said term pay all existing and future taxes, rates, assessments and outgoings of every description for the time being payable either by landlord or tenant in respect of or charged upon the said premises: And will complete all the said dwelling-houses hereinbefore expressed to be hereby demised with yards, gardens, forecourts, offices, out-buildings, sewers and drains to the same respectively, so that the same shall be fit for habitation and use, to the satisfaction of the surveyor for the time being of the lessors, their heirs or assigns, within twelve calendar months from the date hereof: And will during the said term, at their own expense, and without being thereunto required, keep all the said premises (including the said moiety hereinbefore demised of the said

street, and the corresponding moiety of the sewer or drain under the same) in good condition and complete repair: And in particular paint the external wood and iron-work thereof in every fourth year of the said term, and the inside wood and iron-work once during the last three years of the said term: And will permit the lessors, their heirs, or assigns, and their agents, surveyors and workmen at all reasonable times to enter into the said premises to view the condition thereof, and give or leave notice in writing upon the said premises for the lessees, their executors, administrators or assigns, of all defects and want of repair then found: And will during the said term, at the like expense, keep the said dwelling-houses and all other buildings and landlord's fixtures which may at any time be erected or placed on or about the said first-mentioned parcel of ground insured against loss or damage by fire in a sum of £ at least, by a policy or policies to be effected in such office in the City of London or Westminster, as the lessors, their heirs or assigns shall from time to time approve: And will whenever required produce the policy or policies of such insurance, and the current year's receipt, for the premium and other sums payable for keeping the same on foot, to the lessors, their heirs or assigns or their agent: And will not carry on or permit to be carried on upon the said premises or any part thereof any manufacture of an obnoxious character, or any noisy, noisome, offensive or dangerous trade, business or occupation, or any nuisance, but will use the same only as private dwelling-houses or shops, or for carrying on handicraft occupations of a quiet, innoxious and inoffensive nature: And will not assign the said premises or any part thereof without the licence in writing of the lessors, their heirs or assigns: And will at the expiration or sooner determination of the said term deliver up to the lessors, their heirs or assigns the said premises and all fixtures which may at any time during the last years of the said term be in or about the same, in such good condition and complete repair as aforesaid, and in such state and condition as shall be consistent with the due performance of the several covenants hereinbefore contained: Provided always, and it is hereby agreed and declared, that if the said street, a moiety whereof is hereinbefore expressed to be hereby demised, and the sewer or

drain under the same, shall wholly or partially be adopted by the parish or public as a public road, sewer and drain, then and thenceforth the obligation under the covenant in that behalf hereinbefore contained to keep the same in repair shall cease wholly, or to the extent to which the same may be adopted by the parish or public as aforesaid: Provided always and these presents are on this express condition, and if and whenever any part of the said rent shall be in arrear for twenty-one days, whether the same shall have been legally demanded or not, or if and whenever there shall be a breach of any of the covenants by the lessees hereinbefore contained (except in the case mentioned in the proviso lastly hereinbefore contained), the lessors, their heirs or assigns may re-enter upon any part of the said premises in the name of the whole, and thereupon the said term of years shall absolutely determine: And the lessors do hereby for themselves, their heirs, executors, administrators and assigns, covenant with the lessees, their executors, administrators and assigns, that they, paying the said rent and performing and observing all the covenants hereinbefore contained, may peaceably hold and enjoy the said premises during the said term without any interruption by the said lessors, their heirs or assigns or any person claiming under them. In witness, &c.

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5. LEASE *to a Builder excepting Rights limiting the use of adjoining Property and Minerals. Covenant by Lessee to erect Houses of not less than a specified yearly value, and Roads and Sewers. Houses to be used only as Private Dwelling-Houses or Professional Residences. Proviso restricting right of Re-entry until the expiration of a Six Months' Notice.*

This Indenture made the day of , 18 , between A. B., of &c. (hereinafter called the lessor), of the one part, and C. D., of &c. (hereinafter called the lessee), of the other part, Witnesseth that, in consideration of the rent hereinafter reserved and of the covenants by the lessee hereinafter contained, the lessor doth hereby demise unto the lessee, his executors, administrators and assigns, All that parcel of ground, situate in the parish of in the

county of , whereof the area is represented as edged red in the plan drawn in the margin of these presents, which said parcel of ground includes half, namely, yards in width, of an intended new public street, to be called A. Street, and half, namely, yards in width, of an intended new public street, to be called B. Street, and contains superficially in square measure yards, and in lineal measure of circumference the following dimensions, namely, on the north yards, on the east yards, on the south yards, and on the west yards, and as respects the part which is not in the said halves of the said streets abuts north on Street aforesaid [*give the abuttals*], Together with all rights, easements and appurtenances to the same belonging, or reputed to belong, or usually held or enjoyed therewith: Except the rights (if any) restricting the free use of any adjoining land of the lessor, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise: And except and reserving all minerals lying more than ten yards below the surface of the said parcel of ground, with liberty to search for, get and remove the same by subterranean operations, but so that the surface of the said parcel of ground, and the depth of ten yards next below such surface, be not entered, broken, let down or otherwise damaged or injured, and that compensation be made for all damage or injury (if any) to the said parcel of ground, or any building or erection for the time being thereon: And reserving the free running of water and soil in and through the sewers, drains and channels for the time being in, upon or under the same parcel of ground, or any part thereof, and the right of using for all purposes as public streets, as well the said halves of the streets, as all other streets or portions of streets for the time being upon the said parcel of ground: To have and to hold the premises hereinbefore expressed to be hereby demised unto the lessee, his executors, administrators and assigns for the term of years, from the day of , 18 : Yielding and paying therefor during the said term the yearly rent of £ , by two equal half-yearly payments, on the day of , and the day of , the first of such half-yearly payments to be made on the

day of , 18 , and the last half-yearly payment to be made in advance on the day of next preceding the expiration of the said term: And yielding and paying in the event of and immediately upon the said term being determined by re-entry under the proviso hereinafter contained, a proportionate part of the said rent for the fraction of the current half-year up to the day of such re-entry: The said rent to be paid clear of all deductions: And the lessee doth hereby for himself, his heirs, executors, administrators and assigns covenant with the lessor, his heirs and assigns: That he the lessee, his executors, administrators or assigns will during the said term pay the said rent hereinbefore reserved upon the days and in the manner aforesaid: And [*pay taxes, ante*, p. 86]: And will immediately after the execution of these presents fence off from the adjoining lands and streets, and enclose with a good and substantial fence, so much of the said parcel of ground as does not constitute the said halves of streets, and during the said term maintain and keep the same so fenced off and inclosed to the satisfaction in all respects of the lessor, his heirs or assigns, or his or their surveyor: And on the land so to be fenced off and enclosed as last aforesaid, will erect, and within months from the date hereof, complete and make fit for habitation, and thenceforward during the said term maintain in good and substantial repair and condition, and to the satisfaction of the lessor, his heirs or assigns, or his or their surveyor, one or more dwelling-house or dwelling-houses, of not less than the aggregate clear yearly letting value of £ , and will build every such dwelling-house of good bricks, set in good lime mortar, and covered with stucco in imitation of Bath-stone, and of good oak or fir timber, and roofed with good slates or tiles: And will not erect or continue upon the said land, or any part thereof, any dwelling-house which shall be of less clear yearly letting value than £ , or any dwelling-house or other building, fence or erection nearer to the external boundaries of the said parcel of ground than the building line indicated on the said plan, or except such as shall respectively be in accordance, as to situation, architectural and general design and character, elevations, form, workmanship, materials, sewers, drains, yards, ashpits, offices and outbuildings, with

such plans and specifications as shall have been previously approved of by the lessor, his heirs or assigns, or his or their surveyor: And will at his and their own expense as occasion shall require [*repair and paint, ante*, p. 86]: And once at least in every years re-colour and re-joint in imitation of Bath-stone the outside stucco, and clean the outside stonework of the said dwelling-houses: And will [*permit lessor to enter to view, ante*, p. 87]: And will within three calendar months next after such notice well and sufficiently repair and make good such defects and want of repair, and will permit the workmen of the lessor, his heirs or assigns, or of his or their tenants or occupiers of the houses adjoining, at all reasonable times to enter in or upon the said premises [*to repair adjoining house or drains, making good all damage*]: And will forthwith at his or their own expense lay and make all the roadways of the streets or portions of streets comprised in and forming part of the said parcel of ground in such manner, of such description, with such materials and according to such system as the lessor, his heirs or assigns, or his or their surveyor, shall specially direct in writing or print, or as, in the absence of any such special direction, shall be specified in any general directions of such surveyor of which a copy or print shall have been delivered to the lessee, his executors, administrators or assigns: And will, at the like expense, during the said term, after the said roadways shall have been so laid and made, maintain the same in good condition and complete repair, to the entire satisfaction of the lessor, his heirs or assigns, or his or their surveyor: And will, at the like expense, forthwith form and make all such main sewers, drains and channels in, through, under and upon the said parcel of ground in such respective courses and directions, and of such respective heights and levels, and with such declivities and falls, of such materials, with such stench-traps, gully-holes and grids, and upon and according to such plans and systems, and so as to join or coalesce with sewers, drains and channels in or on the adjoining lands, as the lessor, his heirs or assigns, or his or their surveyor shall specially direct in writing or print, or as, in the absence of any such special direction, shall be specified in any such general directions as aforesaid of such surveyor: And will, at the like expense, during the

said term maintain the said main sewers, drains, channels, eyes, stench-traps, gully-holes and grids so formed and made as aforesaid in good condition and complete repair, to the entire satisfaction of the lessor, his heirs or assigns, or his or their surveyor: And will, if at any time during the said term default shall be made by the lessee, his executors, administrators or assigns in laying, forming or making or in maintaining any such roadways, main sewers, drains, channels, eyes, stench-traps, gully-holes and grids as aforesaid, permit the lessor, his heirs or assigns, and his or their agent or surveyor, to enter upon the said premises with surveyors, workmen or others at any time after notice in writing shall have been given to the lessee, his executors, administrators or assigns, or left upon part of the said premises, to make good or redeem any such default, and after further default for the space of twenty-eight days after giving or leaving such notice, to execute and do all such works and things as the lessor, his heirs or assigns, or his or their agent or surveyor, shall think proper for laying, forming, making or maintaining any such roadway, main sewer, drain, channel, eye, stench-trap, gully-hole or grid as aforesaid: And will on demand pay to the lessor, his heirs or assigns, all expenses incurred by him or them respectively in or about the preparation, giving or leaving of such notice, and the execution and doing of such works and things as aforesaid: And will [*insure, produce premiums*, p. 87, *and lay out insurance monies in reinstating the premises burnt down*]: And will not dig for or remove any earth or other substance from any part of the said premises, except such as it may in the opinion of the surveyor for the time being of the lessor, his heirs or assigns, be necessary to remove for the purpose of laying the foundation of the buildings hereinbefore covenanted to be erected: And also will not do [carry on] or suffer upon the said premises or any part thereof, or any buildings to be erected as aforesaid, any [offensive trade, business or occupation or other] thing which shall or may be, become or grow to a public or private nuisance, or a damage, disturbance, annoyance or grievance to the lessor, his heirs or assigns, or to any occupier of land or buildings for the time being in the neighbourhood of the said premises, [or any trade, business, profession or occupation

whatever except those of a medical practitioner, solicitor and ladies' or gentlemen's school (*specify any other permitted occupation*), and such other occupation (if any) as the lessor, his heirs or assigns, or his or their agent shall in writing previously approve of]: And will use all dwelling-houses and buildings to be erected on the said parcel of ground only as private dwelling-houses [or for some such other purpose as aforesaid], and will use the residue of the said parcel of ground only as the site of the offices, out-buildings, gardens, pleasure grounds and other appurtenances to such dwelling-houses and buildings to be so used as aforesaid: And will if and whenever the said premises or any part thereof shall be assigned by the lessee, his executors, administrators or assigns, deliver a copy of the deed of assignment to the lessor, his heirs or assigns, or his or their solicitor or agent, within three calendar months after the execution thereof: And will at the expiration or sooner determination of the said term deliver up to the lessor, his heirs and assigns, the said premises, together with all fixtures and additions thereto, in such good and substantial repair and condition as aforesaid, and in all respects in such state and condition as shall be consistent with the due performance of the several covenants hereinbefore contained. Provided always, and these presents are upon this express condition, that if and whenever any part of the rent hereby reserved shall be in arrear for twenty-one days, whether the same shall have been legally demanded or not, whenever there shall be a breach of any of the covenants by the lessee hereinbefore contained, the lessor, his heirs or assigns, may re-enter upon any part of the said premises in the name of the whole, and thereupon the said term of years shall absolutely determine. Provided always, that except for non-payment of rent within days as aforesaid, or for a breach of covenant committed or suffered after notice in writing of an intention to re-enter for the same as hereinafter mentioned, the power of re-entry hereinbefore contained shall not be exercised unless and until the lessor, his heirs or assigns, or his or their agent or surveyor shall have given to the lessee, his executors, administrators or assigns, or left on some part of the said premises, a notice in writing of the intention to re-enter,

and of the specific breach or breaches of covenant in respect of which the re-entry is intended to be made, and default shall have been made by the lessee, his executors, administrators or assigns for six calendar months after the giving or leaving of such notice in repairing every such breach, and in performing and observing every covenant referred to in such notice. [*Covenant by the lessor for quiet enjoyment, ante*, p. 88.]

In witness, &c.

III. A SCHEDULE OF RULES FOR PROFESSIONAL PRACTICE AND CHARGES OF ARCHITECTS.

PUBLISHED UNDER THE SANCTION OF THE ROYAL INSTITUTE OF BRITISH ARCHITECTS AND CONFIRMED AT A GENERAL CONFERENCE OF ARCHITECTS OF THE UNITED KINGDOM, 1872.

The usual remuneration is at 5 per cent. commission besides expenses	1. The usual remuneration for an architect's services, except as hereinafter mentioned, is a commission of 5 per cent. on the total cost of the works executed from his designs; besides which all travelling and other incidental expenses incurred by the architect are paid by the employer, who may be also charged for time occupied in travelling if the work be executed at a considerable or inconvenient distance, or if more than ordinary personal attendance is required.
except for decorative work.	2. But for all works in which the expenditure is mainly for skilled labour and not for materials, *e.g.* in designs for the fittings and furniture of buildings, for their decoration with painting or mosaic, for their sculpture, for stained glass, and other like works, the architect's charge is not made by way of commission on the cost, but should be regulated by special circumstances and conditions.
Repetition in some cases justifies a lower rate,	3. When several similar but distinct buildings are erected at the same time from a single specification, and one set of drawings, and under one contract, the commission of 5 per cent. should be charged on the cost of one such building, and a modified arrangement should be made in respect of the others.

and small outlay a higher rate of percentage.

4. In works of small value, say 500*l.* in amount, 5 per cent. is not remunerative, and the charge should be by time, or by an ascending scale, reaching 10 per cent. for works under 100*l.*

Commission is to be reckoned as if for new materials and a builder employed and chargeable on all executed, and 2½ per cent. on all omitted work.

5. The commission is reckoned upon the total cost of the works, valued as if executed by a builder, and of new materials. 2½ per cent. is charged upon any works originally included in the contract, but subsequently omitted in execution.

This is exclusive of the charge for measuring extras and omissions.

An architect always entitled to payments on account.

6. The architect is entitled during the progress of the building to payment on account at the rate of 5 per cent. on the instalments paid to the builder, or otherwise to half the commission on the signing of the contract, or the commencement of the works, and the remainder by instalments as above.

N.B.—The terms of payment adopted by her Majesty's office of works and public buildings may also be taken as an equitable method of payment on account, viz.:—

One-third part of the commission shall be paid to the architect immediately after the signing of the contract;

One-third part shall be paid to the architect as soon as one-half of the contract sum has been paid to the builder;

And the remaining one-third part shall be paid to the architect after the final payment to the builder.

Charge for special services,

7. The above charges do not cover professional services in connection with negotiations for site, in surveying it and taking levels, in making surveys and plans of buildings to be altered, in arrangements respecting party walls or right of lights, nor services incidental to arrangements consequent upon the failure of builders whilst carrying out work, or in cases of subsequent litigation; but all such services are charged for in addition.

and material alterations of plan by time.

8. If the employer, after having agreed to a design, and had the contract drawings prepared, should have material alterations made, whether before or after the contract is prepared, an extra charge should be made, unless such alterations are rendered necessary by an unreasonable excess in the builder's tender beyond the architect's approximate estimate.

Charge for plans and specification only half the commission, adding one-half per cent. if tenders are obtained.	9. If the architect should have drawn out the approved design complete, with plans, elevations, sections and specification, the charge is half the commission upon the estimated cost. If he should, in addition, have procured tenders in accordance with the instruction of his employer, the charge is one-half per cent. extra.
Alterations to premises may be charged at higher rate.	10. For works in the alteration of premises, a special charge may be made on account of the special difficulties and trouble generally involved.
The commission covers sketches, plans, details, one set tracings, and duplicate specification, instructions, superintendence, examining accounts,	11. The following are the professional services included in the ordinary charge of 5 per cent.:— The requisite preliminary sketches, drawings and specifications sufficient for an estimate and contract. Detailed drawings and instructions for execution. One set of tracings and duplicate specification. General superintendence of works (exclusive of clerk of the works). Examining and passing the accounts, exclusive of measuring and making out extras and omissions.
also approximate estimate.	12. No additional remuneration is due for making an approximate estimate, such as may be obtained, for instance, by cubing out the contents. If a detailed estimate be required by the employer, an additional percentage charge may be made.
The usual charge per day.	13. The charge per day made by architects depends upon their professional position, the minimum charge being three guineas per day.
All payments to architect to be from employer.	14. The above payments alluded to in this document are to be made by the employer to the architect, who is not to receive commission or payment of any kind from the builder, or any tradesman, in respect of works executed under the architect's direction.
Quantities.	15. When an architect supplies builders with quantities, on which to form tenders for executing his designs, he should do so with the concurrence of his employer, and it is desirable when practicable, that the architect should be paid by him rather than by the builder, the cost of such extra labour not being included in the commission of 5 per cent.

Ownership of drawings.	16.	In respect of the ownership of drawings and specifications, it has hitherto been the general custom for the architect to be paid for their use only, those documents remaining his property. N.B.—In case of sketches for works abandoned, this custom is recognized by the office of her Majesty's works and public buildings. No authoritative decision in the Courts of law has, however, as yet been given on the subject: it is therefore desirable, for the present at least, that the architect should have a distinct understanding with his employer on this point.
Estates.	17.	The charge for taking a plan of an estate, laying it out, and arranging for building upon it, should be regulated by the time, skill and trouble involved.
	18.	For actually letting the several plots (in ordinary cases), a sum not exceeding a whole year's ground rent may be charged.
	19.	For inspecting the buildings during their progress (so far as may be necessary to ensure the conditions being fulfilled) and finally certifying for lease, the charge should be a percentage not exceeding one-half per cent. up to 5,000*l.*, and above that by special arrangement.
	20.	All the above fees to be exclusive of travelling expenses, and time occupied in travelling, as before mentioned.
	21.	The charge for the above does not include the commission for preparing specification, directing, superintending, and certifying the proper formation of roads, fences and other works executed at the cost of the employer, nor for putting the plans on the leases.
Valuations.	22.	The following definite charges are recognized for valuation of property:— The charge throughout is 1 per cent. on the first 1,000*l.*, and half per cent. on the remainder up to 10,000*l.* Below 1,000*l.* and beyond 10,000*l.* by special arrangement. These charges do not include travelling expenses, nor attendance before juries, arbitrators, &c.
Dilapidations.	23.	The charge for estimating dilapidations is 5 per cent. on the estimate, and in no case less than two guineas.

By authority of the Institute and confirmed at the General Conference, 1872.

Royal Inst. of British Architects, 9, *Conduit Street, Hanover Square, London, W.*

FRED. P. COCKERELL, *Hon. Sec.*
WILLIAM H. WHITE, *Sec.*

IV. CONDITIONS FOR BUILDING CONTRACTS.

1. *Form of Contract based upon the Conditions agreed to between the London Builders Society and the Royal Institute of British Architects, approved and issued by the National Association of Master Builders of Great Britain.**

CONTRACT FOR .

(To make this contract valid it must be stamped with a 6*d*. stamp.)

Agreement made the day of , 18 , between of the one part, and of the other part.

Witnesseth, that the parties hereto hereby mutually contract and agree with each other; and the said contractor, so far as the stipulations and provisions of this contract, and the works, matters and things herein mentioned or referred to, are to be performed and observed by him, hereby agrees with the said proprietor; and the said proprietor, so far as the said stipulations and provisions, matters, and things, are to be performed by him, hereby agrees with the said contractor as follows, viz.:—

[1. *In the construction of these presents, when the contract will admit of it, the term "contractor" shall mean the said ; the term "Proprietor" shall mean the said ; the term "architect" shall mean , or other the architect for the time being employed by the proprietor to superintend the erection and completion of the works; and the term "works" shall mean all the works, acts, matters, and things, specified and described in the specification, plans, and other drawings, and detailed bills of quantities supplied, hereinafter mentioned, and also such other works, matters, and things as are hereby contracted to be done and performed by the contractor.*]

2. The contractor is to provide everything of every sort and kind which may be necessary and requisite for the due

* This form is the same as that contained in the general conditions for builders' contracts of the Builders Society, with the exception of clauses 1 and 18, which are additional. These and some other slight additions are placed in brackets and italics. Additions to these conditions are placed in brackets alone.

and proper execution of the several works included in the contract according to the true intent and meaning of the drawings and specification taken together, which are to be signed by the architect and the contractor, whether the same may or may not be particularly described in the specification or shown on the drawings, provided that the same are reasonably and obviously to be inferred therefrom, and in case of any discrepancy between the drawings and the specification the architect is to decide which shall be followed.

3. The contractor shall conform in all respects to the provisions and regulations of the [Metropolis Local Management Act and the Metropolis Buildings Act, and to the regulations and bye-laws of the Metropolitan Board of Works, and], or the local authorities, and they are to give all notices required by any local or other acts to be given to any local authority, and to pay all fees payable under any of the said acts to any such authority or to any public officer in respect of the works.

4. The contractor shall set out the whole of the works, and during the progress of the works to amend on the requisition of the architect any errors which may arise therein, and upon request is to provide the necessary appliances or furnish the necessary vouchers to prove that the several materials are such as are described. The contractor shall also provide all plant, labour, and materials which may be necessary and requisite for the works; all materials and workmanship being the best of their respective kinds; and leave the works in all respects clean and perfect at the completion thereof.

5. Complete copies of the drawings and specifications signed by the architect are to be furnished by him or by the measuring surveyor to the contractors for their own use, and the same or copies thereof are to be kept on the buildings in charge of a competent foreman, who is to be constantly kept on the ground by the contractor, and to whom instructions can be given by the architect. The contractor shall not sublet the works, or any part thereof, without the consent [in writing] of the architect.

6. The architect is to have at all times access to the works, which are to be entirely under his control. He

may require the contractor to dismiss any person in the contractor's employ upon the works, who may be incompetent or misconduct himself, and the contractor is forthwith to comply with such requirement.

7. The contractor shall not vary or deviate from the drawings or specification, or execute any extra work of any kind whatsoever, unless the same be required to comply with any of the provisions of any of the acts of parliament, regulations or bye-laws, hereinbefore mentioned, or unless upon the authority of the architect, to be sufficiently shown by any order in writing, or by any plan or drawing expressly given and signed or initialed by him, as an extra or variation, or by any subsequent written approval signed or initialed by him. In cases of day work, all vouchers for the same are to be delivered to the architect or clerk of the works at latest during the week following that in which the work may have been done, and only such day work is to be allowed for, as such, as may have been authorized by the architect to be so done, unless the work cannot from its character be properly measured and valued.

8. Any authority given by the architect for any alteration or addition in or to the works is not to vitiate the contract, but all additions, omissions, or variations made in carrying out the works for which a price may not have been previously agreed upon, are to be measured and valued, and certified for by the architect, and added to or deducted from the amount of the contract, as the case may be, according to the schedule of prices annexed, or where the same may not apply at fair measure and value.

9. All work and materials brought and left upon the ground by the contractor, or by his order, for the purpose of forming part of the works, are to be considered to be the property of the proprietor [employer], when payment shall have been made of the amount of any certificate in which the value thereof shall be included, and in such case the same are not to be removed or taken away by the contractor, or any other person, without the special licence and consent of the architect, but the proprietor [employer] is not to be in any way answerable for any loss or damage which may happen to, or in respect of, any such work or materials either by the same being lost or stolen, or injured by weather or otherwise.

10. The architect is to have full power to require the removal from the premises of all materials which in his opinion are not in accordance with the specification, and in case of default the proprietor [employer] is to be at liberty to employ other persons to remove the same without being answerable or accountable for any loss or damage that may arise or happen to such materials; and the architect is also to have full power to require other proper materials to be substituted; and in case of default the proprietor [employer] may cause the same to be supplied, and all costs which may attend such removal and substitution are to be borne by the contractor.

11. Should any of the works be, in the opinion of the architect, executed with improper materials or defective workmanship, the contractor is, when required by the architect during the progress of the work, forthwith to re-execute the same, and to substitute proper materials and workmanship, and, in case of default of the contractor in so doing within a reasonable time, the architect is to have full power to employ other persons to re-execute the work, and the cost thereof is to be borne by the contractor.

12. Any defects, shrinkage and other faults which may appear within months from the completion of the building, and arising out of defective or improper materials or workmanship are, upon the direction of the architect, to be amended and made good by the contractor at his own cost, unless the architect shall decide that he ought to be paid for the same, and, in case of default, the proprietor may recover from the contractor the cost of making good the works.

13. The contractor is to insure the building against loss or damage by fire, in an office to be approved, in the joint names of the proprietor [employer] and contractor for half the value of the works executed until it shall be covered in, and thenceforth until completion in three-fourths of the amount of such value, and, upon request, to produce to the architect the policies and the receipts for the premiums for such insurance. All moneys received under any such policies are to be applied in or towards the rebuilding or reparation of the works destroyed or injured. In case of neglect the proprietor [employer] is to be at liberty to

insure and deduct the amount of the premiums paid from any moneys payable to the contractor.

14. The building from the commencement of the works to the completion of the same, is to be under the contractor's charge, who shall be responsible for, and make good all injuries, damages and repairs occasioned or rendered necessary to the same, by fire or by causes over which the contractor shall have control, and the contractor shall hold the proprietor [employer] harmless from any claims for injuries to persons or for structural damage to property happening from any neglect, default, want of proper care or misconduct on the part of the contractor or of any one in his employ during the execution of the works.

15. The proprietor [employer] is at all times to have free access to the works, and is to have full power to send workmen upon the premises to execute fittings and other works not included in the contract, for whose operations the contractor is to afford every reasonable facility during ordinary working hours, provided that such operations shall be carried on in such a manner as not to impede the progress of the works included in the contract, but the contractor shall not be responsible for any damage which may happen to or be occasioned by any such fittings or other works.

16. The contractor is to complete the whole of the works (except painting and papering or such other works as the architect may desire to delay), within calendar months after the commencement of the same, unless the works be delayed by reason of any inclement weather, or causes not under the contractor's control, or in case of combination of workmen, or strikes or lockout affecting any of the building trades, for which due allowance shall be made by the architect, and then the contractor is to complete the works within such time as the architect shall consider to be reasonable, and shall from time to time in writing appoint, and in case of default, the contractor is to pay or allow to the proprietor [employer] as and by way of liquidated and agreed damages, the sum of £ per week for every week or part of a week during which he shall be so in default, until the whole of the works (except as aforesaid)

shall be completed, provided the architect shall in writing certify that the works could have been reasonably completed within the time appointed.

17. If the contractor shall become bankrupt, or compound with or make any assignment for the benefit of his creditors, or shall suspend or delay the performance of his part of the contract (except on account of causes mentioned in clause 16, or on account of being restrained or hindered under any proceedings taken by parties interested in any neighbouring property, or in consequence of not having proper instructions, for which the contractor shall have duly applied), the proprietor, either by himself or by the architect, may give to the contractor or his assignee or trustee, as the case may be, notice requiring the works to be proceeded with, and in case of default on the part of the contractor, or his assignee, or trustee, for a period of days, it shall be lawful for the proprietor [employer], or for the architect, or any other person appointed by the proprietor [employer], to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete the same, and to authorize him or them to use the plant, materials, and property of the contractor upon the works, and the costs and charges incurred in any way in carrying on and completing the said works are to be paid to the proprietor [employer] by the contractor, or may be set off by the proprietor [employer] against any money due, or to become due, to the contractor.

[18. *The proprietor [employer] shall pay to the contractor, for the full and perfect completion of this contract, the sum of £ . But if the architect shall direct any addition to, or omission of, or variation from the works, the value of such addition, omission or variation shall be added to or deducted from the said sum of £ as provided in clause* 8, *as the case may be; and if there should be found to be any error in the detailed bills of quantities supplied, such error shall be rectified, and an addition be made to the contractor, or deducted from him, as the case may be, in respect of such error.*]

19. When the value of the works executed and not included in any former certificate shall from time to time amount to the sum of £ , or otherwise at the architect's reasonable discretion, the contractor is to be entitled

to receive payment at the rate of 80 per cent. upon such value until the difference between the per centage and the value of the works executed shall amount to per cent. upon the amount of the contract, after which time the contractor is to be entitled to receive payment of the full value of all works executed and not included in any former payment, and the architect is to give to the contractor certificates accordingly, and when the works shall be completed, or possession of the building shall be given up to the proprietor [employer], the contractor is to be entitled to receive one moiety of the amount remaining due, according to the best estimate of the same that can then be made, and the architect is to give to the contractor certificates accordingly, and the contractor is to be entitled to receive the balance of all moneys due or payable to him under or by virtue of the contract within months from the completion of the works, or from the date of giving up possession thereof to the proprietor whichever shall first happen. The contractor is to be entitled to receive any sum reserved for painting and papering or otherwise, on the completion thereof. Provided always that no final or other certificate is to cover or relieve the contractor from liability under the provisions of clause No. 12, whether or not the same be notified by the architect at the time or subsequently to granting any such certificate.

20. A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, showing the final balance, due or payable to the contractor, is to be conclusive evidence of the works having been duly completed, and that the contractor is entitled to receive payment of the final balance, but without prejudice to the liability of the contractor under the provisions of clause No. 12.

21. If the proprietor [employer] shall make default in paying any moneys to which the contractor may become entitled, for days after the amount thereof shall have been certified, or if the works be delayed for months by or under any proceedings taken by any other parties, the contractor is to be at liberty to suspend the works, and to require payment for all works executed, and all materials wrought up, and for any loss which he may sustain upon any goods or materials purchased for the works, and in

such case the contractor is not to be bound to proceed further with the works contracted for. The contractor is to be entitled to such interest and at such rate as the architect shall certify upon all moneys payable to the contractor, payment of which may have been unduly delayed.

22. Provided always, that in case any question, dispute or difference shall arise between the proprietor [employer], or the architect on his behalf, and the contractor as to what additions, if any, ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the contractor, or by reason or on account of any directions or requisitions of the architect, involving increased cost to the contractor beyond the cost properly attending the carrying out the contract according to the true intent and meaning of the signed drawings and specification, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract, except as to matters left during the progress of the works, to the sole decision or requisition of the architect under clauses Nos. 2, 10 and 11, or in case the contractor shall be dissatisfied with any certificate of the architect under clause No. 8, or under the proviso in clause No. 16, or in case he shall withhold or not give any certificate to which the contractor may be entitled, then such question, dispute, or difference, or such certificate, or the value or matter which should be certified, as the case may be, is to be from time to time referred to the arbitration and final decision of architect, or in the event of his death or unwillingness to act, then of architect, and in the event of his death or unwillingness to act, then of an architect, being a Fellow of the Royal Institute of British Architects, to be appointed on the request of either party by the president for the time being of such institute, and the award of such referee is to be equivalent to a certificate of the architect, and the contractor is to be paid accordingly. Such award or certificate may be made a rule of her Majesty's High Court of Justice, of any court of record in England. The cost of the arbitration and award shall be in discretion of the arbitrator.

Signed by the within-named

and

in the presence of

2. General Conditions for Building Contracts.* *Founded mostly on the "General Headings for Clauses of Contract," as settled between the Council of the Royal Institute of British Architects and the Committee of the London Builders' Society, 23rd December,* 1870.

Note.—For the sake of clearness, the Employer is described throughout in the "singular number" and the Contractor in the "plural."

1. The contractors are in the best and most workmanlike manner to erect, build, execute and finish for the employer the buildings and works included in the contract according to the plans, drawings and specification signed by the contractors and by the architect. The contractors are to provide all plant, labour and materials necessary and requisite for the due and proper execution of the several works described according to the true and reasonable intent and meaning of the drawings and specification.

2. Complete copies of the drawings and specification furnished by the architect or the measuring surveyors to the contractors for their own use are to be kept on the buildings in charge of a competent foreman, to whom instructions can be given by the architect.

3. The architect is to have at all times access to the works, which are to be under his control, with power to order any deviations therein or extra works he may consider necessary. The clerk of the works (should one be appointed by the architect) is in his absence to be considered his deputy, and his reasonable directions are to be in every case attended to, subject to appeal to the architect, but the clerk of the works shall have no power of himself to direct any deviation from the contract involving any increase of expense. The architect may require the contractors to dismiss the foreman or any person employed on the works who may be incompetent or misconduct himself, and such person is not to be re-employed without the architect's consent.

* These conditions were prepared by G. F. Trollope, Esq., Hon. President of the Central Association of Master Builders of London, and are the result of his own long experience as a builder and of valuable opinions received from other competent persons.

4. The contractors or their foreman are to set out under the direction of the architect, or clerk of the works, the whole of the works, and to amend on the requisition of the architect any errors which may arise during their progress. If any discrepancy appear between the drawings and the specification, the architect is to decide which shall be followed. The contractors are not to deviate from the drawings or specification unless upon the direction of the architect or they be required to comply with any act of parliament or local authority.

5. No extra work is to be executed except upon the express order of the architect, to be shown by any instruction or subsequent approval in writing, or by any drawing, plan or account signed or initialed by him. Provided always, that if the architect shall require the contractors to execute any works as a variation which he may decline to order as an extra, the contractors may reserve the question of their right to be paid for the same until the final settlement of accounts. No charge for day work is to be allowed as such unless the authority for the work shall expressly direct it to be done as day work, or unless the work cannot from its character be reasonably valued by measurement. All vouchers for day work are to be delivered to the architect within fourteen days following the week in which the work may have been executed. Any variation made in carrying out the works is not to vitiate the contract, but unless a price or schedule of prices be previously agreed on the value of all variations is to be ascertained by measurement or otherwise. All omitted works are to be deducted at prices not exceeding those contained in the estimate on which the contract was based, and all additional works are to be valued at fair measure and value prices. The value so ascertained to be added to or deducted from the amount of the contract.

6. The architect is to have power to require the contractors to remove from the premises all materials not in accordance with the specification, and in default in so doing for a reasonable time to employ other persons to remove the same, without being answerable for any loss or damage that may happen to such materials. They are also, upon request, to furnish reasonable proof that the several ma-

terials are such as are described. Should any of the works be, in the opinion of the architect, executed with improper materials, or not in accordance with the specification, the contractors are, when required by the architect during the progress of the work (and notwithstanding any certificate for payment which may have been given), forthwith to pull down, remove the same, and to substitute other materials and workmanship without extra charge, unless, in case of dispute, the referee or referees shall decide that the contractors should be paid for such substitution, and in case of default of the contractors in complying with such requirement within a reasonable time the architect is to have power to employ other persons to remove and re-execute all such defective work, and the cost thereof is to be borne by the contractors, and may, if necessary, be deducted out of any sum payable to them by the employer.

7. All work and materials forming or intended to form part of the building contracted for are to be considered to be the property of the employer when payment shall have been made of the amount of any certificate in which the value thereof shall be included, after which payment the same are not to be taken away by the contractors or any other person without the licence and consent of the architect, but the employer is not to be answerable for any loss or damage in respect of such work or materials, either by the same being lost, stolen or injured.

8. The building from the commencement to the completion of the works or delivering up possession of the same, is to be under the contractor's charge, and they are to be responsible for watching and protecting the same, and are to execute all repairs necessary to the same, and they are also to hold the employer harmless from any claims arising from any neglect or fault on the part of the contractors or any one in their employ during the execution of the works.

9. The contractors are to insure in an approved office the building and works against loss by fire in the joint names of the employer and contractors for half the value of the works executed until the building shall be covered in, and thenceforth until completion in three-fourths of the amount of such value, and are, upon request, to produce to the architect the policies and receipts for the premiums

of such insurance. All moneys received under any such policies shall be applied in or towards the rebuilding or reparation of the building destroyed or injured. In case of neglect the employer shall have power to insure, and deduct the amount of premiums from the amount payable to the contractors.

10. The contractors are to complete and leave the whole of the works clean and perfect (except the painting and papering, or such other works as the architect may desire to delay) within calendar months after the commencement of the same, unless the works be delayed by inclement weather, alterations or other causes not under the contractors' control, or in case of combination of workmen, or strike or lock-out affecting any of the building trades, and then the contractors are to complete the works within such time as shall be reasonable, and in case of default the contractors are to pay or allow to the employer, as and by way of liquidated and agreed damages, the sum of per week for every week during which they shall be so in default until the whole of the works (except as aforesaid) shall be so completed, provided the architect shall in writing certify that the works could have been reasonably completed within the time appointed, the amount of such damages in case of dispute to be settled as hereinafter provided.

11. Any defects in the works which may appear within months from the completion of the building arising out of defective or improper materials or workmanship are to be amended and made good by the contractors at their own cost, and in case of default any cost incurred by the employer in so making good the works may be recovered by the employer from the contractors, the amount thereof in case of dispute to be settled as hereinafter provided.

12. When the value of the works executed and materials delivered, not included in any former certificate, shall from time to time amount to the sum of £ the contractors are to be entitled, on certificate of the architect, to receive payment at the rate of 80 per cent. upon such value until the difference between such per centage and such value shall amount to a sum equal to per cent. upon the amount of the contract, after which time the contractors

are to be entitled to receive payment in full for all works executed, and work and materials delivered and not included in any former payment, and the architect is to give to the contractors certificates accordingly, and when the works shall be completed or possession of the building shall be given up to the employer, the contractors are to be entitled to receive one moiety of the amount remaining due according to the best estimate that can then be made by the architect, who is to give to the contractors a certificate accordingly, and the contractors are to be entitled to receive the balance of all moneys due or payable to them under or by virtue of the contract within three months from the completion of the works or from the date of giving up possession thereof to the employer, whichever shall first happen. Any sum reserved for painting and papering or otherwise under clause 10 shall be paid to the contractors on the completion thereof. The contractors are to be entitled to interest on any payments unduly delayed, the amount thereof, in case of dispute, to be settled as hereinafter provided.

13. A certificate of the architect, or an award of a referee or referees, or umpire, showing the amount of the final balance of the accounts, is to be conclusive evidence of the due completion of the works, and entitle the contractors to immediate payment, but without prejudice to the liability of the contractors to amend and make good any defects or other faults as provided in clause 11.

14. If the contractors shall become bankrupt, or make any assignment for the benefit of their creditors, or shall suspend or delay the performance of their part of the contract, except in case of inclement weather, alterations, or other causes as aforesaid, combination, strike or lock-out of workmen affecting any of the building trades, or if the works be delayed for months by or under any proceedings taken by other parties against the employer or owner of the property, or in consequence of not having proper instructions (of which the contractors shall have given due notice) the employer, by the architect, may give to the contractors, or their assignee or trustee, as the case may be, notice requiring the works to be proceeded with, and in case of default on the part of the contractors,

or their assignee or trustee, for a period of days, it shall be lawful for the employer, by the architect, to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete the same, and to authorize him or them to use the plant, materials and property of the contractors upon the works, and the costs and charges incurred in any way in carrying on and completing the said works are to be paid to the employer by the contractors, or may be set off by the employer against any money due or to become due to the contractors.

15. If the employer shall become bankrupt, or compound with or make any assignment for the benefit of his creditors, or shall make default in paying any moneys to which the contractors may become entitled for fourteen days after the amount thereof shall have been certified or determined by arbitration, or if the works be delayed for months by or under any proceedings taken by other parties against the employer or owner of the property, the contractors are to be at liberty to suspend the works, and to require payment for all works executed and all materials wrought up, and any loss upon goods or materials purchased for the works, whether then delivered on the ground or not, and in such case the contractors are not to be bound to proceed further with this contract.

16. Provided always, that in case any question, dispute or difference shall arise between the employer, or the architect on his behalf, and the contractors, as to what additions, if any, ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the contractors, or by reason or on account of any directions or requisitions of the architect involving increased cost to the contractors beyond the cost properly attending the carrying out the contract according to the true intent and meaning of the signed drawings and specification, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract, except as to matters left during the progress of the works to the sole decision or requisition of the architect under clauses Nos. 4 and 6, or in case the contractors shall be dissatisfied with any certificate of the architect under

clause 5, or under the proviso in clause No. 14, or in case he shall withhold or not give any certificate to which they may be entitled, then such question, dispute or difference, or such certificate, or the value or matter which should be certified, is to be from time to time referred without any suit at law or equity, either to one arbitrator, to be agreed on mutually, or to two arbitrators, one to be named by the employer and one by the contractors, who shall have power to employ an umpire, if necessary, to be nominated in case of difference, at the request of either party, by the president for the time being of the Royal Institute of British Architects. The costs of any such reference shall be in the discretion of the arbitrators or umpire, whose decision shall be final and binding upon all parties without any power of appeal.

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Reserve cover.

ADDENDUM

TO

A Digest of Building Cases

BY

E. S. ROSCOE,

BARRISTER-AT-LAW.

Judgment of the Common Pleas Division

IN

Clemence v. *Clarke*,

ON

THE DUTIES OF ARCHITECTS, THEIR CERTIFICATES,

AND

The Arbitration Clause in Building Contracts.

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ADDENDUM.

The Case of CLEMENCE *v.* CLARKE.

An architect may make his certificate from the measurements of a competent surveyor, but if he delegates the whole of his duty that would amount to legal misconduct, which would avoid a certificate.

When a contract states that "a certificate of the architect showing a final balance is to be conclusive evidence of the works being completed," it is legally conclusive, and cannot in the absence of misconduct on the part of the architect be set aside.

The usual arbitration clause as to disputes arising between the employer or the architect on his behalf, and the contractor, only refers to disputes which arise between the architect and the contractor.* (*Clemence* v. *Clarke*, 1880.)

* As to the authority and duty of an architect, see Digest of Building Cases, pp. 1 and 4; as to certificates, p. 18. This case is one of such considerable importance to architects and builders that, as it is understood that it will not be reported in the regular legal reports, it is now published as an Addendum to the Digest of Building Cases, the transcript of the judgment from the shorthand writer's notes having been carefully revised by the author.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION.*

February 25, 1880.

CLEMENCE *v.* CLARKE.

Action by a builder for balance of money due for work done. Judgment given at the trial by Lord Coleridge for the plaintiff. A rule nisi was granted for a new trial, and when the question whether the rule should be made absolute was argued, the Court decided in favour of the judgment given by Lord Coleridge at the trial.

The certificate of the architect was in the following form:—

LONDON, *September* 19*th*, 1878.

I hereby certify that J. C. is entitled to receive the sum of 585*l.* to balance account of works, as certified by the measuring surveyor, to be the final amount due thereon, executed by him at, &c.

C. F. H., *Architect.*

The clauses of the contract referred to were Nos. 17, 18, and 20. The two former varied but slightly from those in the General Conditions for Building Contracts, prepared by the London Builders' Society, but in consequence of these small changes they are given below. No. 20 is the ordinary arbitration clause, as printed in the above Conditions. See Appendix to Digest of Building Cases, pp. 103, 104, 105, clauses Nos. 19, 20, and 22.

17. When the value of the works executed and not included in any former certificate shall from time to time amount to the sum of 500*l.*, or otherwise, at the architect's reasonable discretion, the contractor is to be entitled to receive payment at the rate of 80 per cent. upon such value until the difference between the per centage and the value of the works executed shall amount to 10 per cent. upon the amount of the contract, after which time the contractor is to be entitled to receive payment of the full value of all works executed and not included in any former payment, and the architect is to give to the contractor cer-

* *Coram* Lord Coleridge, C.J., and Grove and Lindley, JJ.

tificates accordingly; and when the works shall be completed the contractor is to be entitled to receive one moiety of the amount remaining due after deducting any sum for work delayed by order of the architect, which is to be paid for within four weeks after the same shall have been executed according to the best estimate of the same that can be then made, and the architect is to give to the contractor certificates accordingly, and the contractor is to be entitled to receive the balance of all moneys due or payable to him under or by virtue of the contract within three months from the completion of the works, except 50*l.*, which may be retained for six months. Provided always, that no final or other certificate is to cover or relieve the contractor from his liability under the provisions of clause No. 11, whether or not the same be notified by the architect at the time or subsequently to granting any such certificate.

18. A certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, showing the final balance due or payable to the contractor, is to be conclusive evidence of the works having been duly completed, and that the contractor is entitled to receive payment of the final balance, but without prejudice to the liability of the contractor under the provisions of clause No. 11.

JUDGMENT.

Mr. Justice Grove: I am of opinion that this rule should be discharged. There were two broad points upon which the rule was granted, namely, that the certificate clause 18 was not final, and that if the clause were final, the certificate of the architect showed upon the face of it that he had not properly exercised the duties which he was supposed to have undertaken of certifying to the work being properly done and the balance being due; because in the certificate, after stating that the contractor was entitled to receive the sum of 585*l.*, &c., to balance account of works, he uses these words: "as certified by the measuring surveyor to be the final amount due thereon." Now, a considerable contest was made before myself and

my brother Lopes when this rule was moved, that the certificate of the architect showed upon the face of it that he had not exercised his own judgment, because he uses the words, "as certified by the measuring surveyors to be the final amount due thereon." I read the words thus: "as certified by the measuring surveyor." Perhaps I ought to pause there. Those words are in a parenthesis. Upon the face of it—to put it as clearly as I can—the certificate in regard to this point would have been good if he had said, "I certify that Mr. Clemence is entitled to receive the sum of 585*l.*, the amount due thereon from the works executed by him;" and what is excepted to is, "to balance account of the works as certified by the measuring surveyor." But supposing those words were put between a parenthesis, I take the objection to be, not that the architect does not pledge himself to the proper balance due, but that he takes the measuring surveyor's certificate of the measurement, and it may possibly be of other matters connected with the work; that is to say, as to whether certain details, such as certain extras which ought to be paid for, are included in the measurement which the measuring surveyor has made or not. It is alleged that he has delegated his authority to the measuring surveyor, and that the certificate shows that upon the face of it. Now, it appears to me that, reasonably and fairly read, the certificate is that the measuring surveyor has gone over the measurement of the work for the architect, and that upon that measurement the architect himself has—because he must be assumed, I think, to have the contract before him in which the prices are named—found what is the balance due. But I will assume not himself to have either measured or gone over the work done by the measuring surveyor. That I take to be a fair construction of this document, giving to it all the force which the document in this case can fairly claim to have given to it. Now, I do not think that voids this certificate. If an architect is intrusted with the general direction and superintendence of work, his duties could not be performed if he were expected individually to go over every matter in detail, and it cannot be that his certificate should be held bad by a court of law because he has not himself gone into every detail. The architect in this case evidently from the history

of the case must have known the general character of the work; he must have seen what was done. It is not said or attempted to be contended that he did not know the contract, that he did not know the specification, that he did not know the general nature of the work, and that he did not know of certain extra work and of certain omissions which had taken place in the course of the work; because we have it admitted that he gave certain certificates anterior to this final certificate, and that he attended as architect of the work.

Then I will assume that the measuring up and the taking out of the quantities was done by a surveyor; I do not see how any architect could ever discharge such a duty if he were required personally to go into the details of all the work. It may be that the measuring of some classes of the work and the quality of the material could be properly got at by skilled persons who may be employed under the architect. If the architect, who is for the purpose of this certificate, a judge, though in certain parts of the document he is treated as an agent, were bound to do all the details of various kinds of work himself, in all probability he would be incompetent to do them, because although he is skilled as an architect and skilled as a person generally in surveying works, he may not have skill in the particular details of all the contributions to this general work. It being admitted that the architect has behaved with perfect honesty in the matter; that there is nothing in the shape of corruption or improper conduct attributed to him, I do not think that this certificate is less final because he has taken the measurement of the works from the surveyor who has gone through the work and made a report of the measurement to him. I do not know that in saying what I now say, I am not going further than the certificate upon the face of it must necessarily intend, because, as I have already observed, the certificate does not upon the face of it absolutely negative his having gone over them. He may have gone over them as well as the measuring surveyor. It does not exclude him. But I would rather put it upon the other ground, because without assuming the other ground, the question of rejection of evidence would become much stronger in favour of

the present rule. Then I am of opinion that where such a function as that mentioned in clause 18 of this contract, is by both parties agreed to be conferred upon the architect, if Courts of Law were to re-open it, it would be virtually to put an end to the whole value of it where there is no misconduct either legal or moral in the architect, but merely because he has not investigated every measurement and every item of the work himself. I think all that you can expect under those circumstances is that the parties should, in the absence of misconduct on the part of the architect upon whose judgment they have relied, accept his decision. If indeed the architect had delegated the whole of his duty to another person; if he had taken another person and paid him a smaller sum of money than probably he would be entitled to—if he had taken a man of inferior station to supervise and look over all the work, instead of himself, and had abdicated his whole functions wholly in favour of another person, that would have been a ground for setting aside the certificate, because in that case it would have amounted to misconduct—it might not certainly amount to fraud, because the architect might not think he was doing a wrong thing, but it would amount to that which the law would call misconduct, because he would be delegating his own duties, upon the performance of which the parties rely, to another person; but it does not appear to me that that was the case here, judging from the certificate.

Then I come to the question of the rejection of evidence. If I were satisfied that evidence had been tendered which showed that the architect had abdicated his functions, had employed another person to do what I may call architect's work, or to do a large part of the architect's work, instead of himself, I should have been disposed to make this rule absolute for a new trial; but it appears to me that what was really tendered was evidence that the measurements were left to the measuring surveyor, and not gone over by the architect himself, and possibly some other matters of detail, such as the question of adding up the extras and omissions. That does not avoid the decision of the architect, and the force of the final certificate under clause 18. I think the fair and legal view of the matter is

that where parties determine to put a matter into the hands of a third party, and where it is agreed that they shall be bound by his decision, they are bound by that decision unless something which amounts practically to misconduct be shown.

Now that brings me to what the clause making the certificate final is. In clause 17 there is a proviso that when the works shall be completed the contractor is entitled to receive one moiety of the amount remaining due, after deducting any sum for work delayed by order of the architect, which is to be paid for within four weeks after the same shall have been executed according to the best estimate of the same that can then be made, and the architect is to give the contractor certificates accordingly, and the contractor is to be entitled to receive the balance of all moneys due or payable to him under or by virtue of the contract within three months from the completion of the works. Now I do not think it necessary to pronounce an opinion as to whether the plural word "certificates" includes or excludes the final certificate. Reading it most in favour of the defendant here, I will assume that it does include all certificates—both intermediate and final—that it is a proviso that the money shall be paid in a certain time, and it is followed by this proviso, "provided, that no final or other certificate," showing this clause applies to both, and therefore, perhaps, in favour of the contention, that the final certificate is included in it for certain purposes only "to relieve the contractor, &c." Now it is clear, at all events, that that proviso includes the final certificate, whether the word "certificates" be before it or not. But that proviso does not touch the question now before the court.

Then comes the clause in question, number 18, to which I have referred before. Now, it is contended that that certificate which the parties agreed to, which they call a certificate showing the final balance, which has been called a final certificate in the previous clause, which says that it is to be conclusive evidence, is not a final certificate, but the whole may be under the circumstances reopened. It seems to me that the words are so clear and expressive that I can add nothing to them to make them more absolute and more definite.

But it is said, in aid of the argument that this does not mean finality, that there is an arbitration clause. But I think that that mainly applies to intermediate work; but it may also, and does undoubtedly in terms, apply to the question of the matter being completed. But to what does this refer? To my mind not to disputes between the employer and his contractor, but between the employer and the architect on the one hand and the contractor on the other hand. And who is the person who is likely to dispute the questions of the works having been completed? Why, I should think the contractor would be anxious to get his money. The contractor might allege that the works were completed, when the architect says they are not; and in case of a dispute like that between the contractor on the one hand and the architect on the other (and this would appear a reason for the arbitration clause) where he enters into a dispute with the contractor, then he is not to be allowed to be a judge in his own case, and then a reference should be had. And in such a dispute as that the arbitrator is to be in the place of the architect, and then his certificate or his award is to be final; and that is unquestionably provided for by clause 18, because it is a "certificate of the architect on the award of the referee, hereinafter referred to," showing the final balance is to be conclusive evidence.

Now, if the argument is that the certificate of the arbitrator is not to be conclusive, precisely the same argument must apply to the award of the referee to whom the parties have referred, and therefore if it is made, the award is not final and can be reopened in a court of law, so that virtually sections 18 and 20 become practically nullities—only provisional—and the whole can be reopened and referred to a court of law. I cannot adopt that construction of the contract. Speaking generally, and without going into further detail, I read it in this way—If there be a dispute between the architect and the contractor that shall be referred to the arbitrator. If on the other hand there be no such dispute, and the architect is allowed to make his certificate, his award shall be final. I take it, therefore, that the matter stands thus: the parties have agreed under certain circumstances which have occurred here, that there shall be a certificate of the architect showing a final

balance, which certificate shall be conclusive evidence of the amount of that final balance. That certificate has been given here; that certificate is not bad *primâ facie*, because there is nothing, construing it most favourably for the defendant, to show that anything except some portion of the measuring work has been done by the measuring surveyor. There is nothing to show that the architect has deputed his judicial position as architect to another person, has acted upon the judgment of another person, and has not exercised his judgment.

There is nothing to show that the architect was himself obliged to go through all the details of the measurements and the other details to which I have referred, and I think therefore the certificate of the architect, who is arbitrator in some sense, is good.

As regards the evidence, I have already stated that I am of opinion that there was no evidence which would have altered the matter, or which could have altered the matter so as to show anything like that which in fact is denied and not put forward on the part of the defendants, such as legal or moral misconduct on the part of the architect, and that therefore the architect's certificate within clause 18 is final. Accordingly the money is due to the plaintiff, and the verdict for him ought to stand.

Mr. Justice Lindley: I am of the same opinion. The questions which have been discussed really may be considered under two heads, first of all, the true construction of the deed, and of what is called the final certificate, and, secondly, the alleged error in rejecting evidence to impeach the certificate. They are two totally different matters, and I will consider them accordingly. With respect to the true construction of the deed, *primâ facie* this certificate, which purports to be a final certificate, appears to be binding under clause 18 of the conditions. It is said, however, that this is not a final certificate such as is contemplated by these conditions, and that the defendant is not bound by it; that the final certificate which was contemplated by the conditions was to be made by the architects upon the completion of the works; and he relies for that construction upon the language in clause 17. Now I have looked at

clause 17 with some care, and it provides for the granting by the architect of what may be called the interim certificates, and then says what is to be done when the work is completed; and when the work is completed it appears the general scheme of it is this, that an estimate is to be made of what remains due under the contract, and half of that estimate is to be paid at once; then the ultimate balance is left for future determination—of course the ultimate balance will not be an estimate, it will be a careful calculation; it will not be an ultimate balance estimate, it will be the ultimate balance of what is due according to the contract. But clause 17 is a little imperfectly worded because it does not say in so many words that the architect is to settle that by a final certificate; but, although it does not say so in so many words, it is impossible to construe clause 17 and 18 without seeing that he is the person to do it in the first place; if he is not, there is no other machinery for finding out what this final balance is. Again, when we look at the language of clause 17, after providing for the payment of half the estimate, it runs on thus—"and the contractor is to be entitled to receive, &c." That language shows plainly enough that a final certificate was to be granted, and the only thing final is the ultimate balance of what was due under the contract. It appears to me quite impossible to construe clause 17 in any other way than this, that the person who is to ascertain and settle what the final balance is, is the architect; and that is more plain still when you come to clause 18, because, pursuing the same idea, clause 18 says, "a certificate of the architect or an award of the referee," &c. Now, I confess I cannot agree with the argument that the final balance here is not the final balance at all, but that rough cost which is to be made on the completion of the works, and upon which the payment of account is to proceed. It strikes me that a final balance is a thing to be ultimately calculated—the *final* balance—in fact what is expressed; and, although not stated in so many words that the architect is to make that, it appears to me quite impossible to construe clauses 17 and 18 except in the sense that he is the person to make it, and that when made it is conclusive as provided by section 18.

Then it is argued the certificate is not to be conclusive,

because there may be an arbitration under clause 20. I confess I doubt this very much; but, assuming this, the clause will stand thus: there will be two clauses in this provision; one says that the final certificate is to be final, the other says it may be referred. Assume that to be so, what does that mean? What interpretation is to be put upon two such clauses? I apprehend you must give them both effect, and it would stand in this way: that if it is capable of being made the subject of reference, it is not to be conclusive for the purpose of that reference, but it is to be conclusive for every other purpose. That would be the construction I should put upon it, assuming that the certificate is a proper subject matter of reference, which I doubt very much indeed, particularly because of the language of the body of the clause, and, more particularly, because of the language at the end, where it says that the award of the referee is to be equivalent to the certificate of the architect. Therefore, if it is open to reference under clause 20, it is at all events final for every purpose except the purpose of reference; and, in either view, the construction put upon it by counsel for the defendant would in my judgment be erroneous. It appears to me, therefore, that so far as the construction of the contract goes the case must be decided adversely to him, and there is no misdirection at all—the proper view is taken of the true construction of that document.

Then the next question is, whether evidence ought to have been received or rejected for the purpose of impeaching this certificate. The certificate, of course, might be impeached for fraud; it might be impeached for collusion; on the other hand, it cannot be impeached for mere negligence, or mere mistake, or mere idleness on the part of the architect; and, having read the shorthand notes of what took place at the trial with some care, I have come to the conclusion that what was meant was that evidence would have been forthcoming to prove some such matters as this, viz., to prove, for example, that the architect had never given signed orders for extras, or that evidence would have been given that he trusted as to the measurements to the quantity surveyor. That last point is apparent upon the face of this final certificate; and I have looked through the shorthand

notes with a view to see whether it was in substance suggested that there was any evidence forthcoming to show that the certificate was not in point of law the architect's certificate, that is to say, to show such an abdication of his functions as to render the certificate not his or anything of the kind. I cannot come to the conclusion that any such evidence as that was tendered, or that any offer was made of evidence going to anything like that extent. But it appears to me nothing short of that, or of fraud or collusion (which was not suggested), would have been of any avail; therefore I think that there was no evidence rejected which would have availed the defendant.

Lord Coleridge concurred.